IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 1106 147

SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

PAULINE G. JESTER, as Administratrix of the Estate of Claude V. Jester, deceased, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

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TABLE OF CONTENTS.

TABLE OF CASES.

STATUTES AND COURT RULES

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Petitioner prays this Court to review on writ of certiorari a judgment of the Supreme Court of South Carolina, in the case there (invertedly) entitled *Pauline G. Jester, as Administrator (sic) of the Intestate Estate of Claude V. Jester, Respondent*, v. *Southern Railway Company, a Corporation, Appellant*, Case No. 2496, rendered on the 7th day of April, 1944 (R. 51-61), and based upon a written opinion by that court rendered on the same date (R. 51-61), Opinion No. 15636, which judgment became final on the 28th day of April, 1944, by the entry on that date by the court below of an order overruling petitioner's petition for rehearing thereof (R. 67), which judgment affirmed a judgment of the Court of Common Pleas for Greenville County, South Carolina, upon a jury verdict in favor of respondent in the amount of $30,000, under the Federal Employers' Liability Act (35 Stat. 65, 36 Stat. 291, 53 Stat. 1404), 45 U. S. C.

51-59, for the alleged wrongful death of her intestate, a locomotive fireman, on July 28, 1942, when, while on a trip on a freight train, "an argument arose between the fireman and engineer, resulting in the death of C. V. Jester, the fireman, caused by pistol shots fired into his body by C. H. Black, the engineer" (R. 51).

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Questions Presented.

1. When a locomotive engineer, without any signal or order to do so, but in violation of his conductor's order to him and his fireman "to quit fussing and get back on the engine and get their work done," stops his locomotive, draws a pistol and maliciously shoots the fireman twice, almost instantly killing him, in pursuance of a personal quarrel between the two, can it be held that the fireman's death resulted "in whole or in part from the negligence" of the engineer, so as to make the employer railroad liable therefor under the Federal Employers' Liability Act?

2. Even if such malicious homicide by the engineer can be held to be within the breadth of the term "negligence" as used in the Act, can it be held to have been committed within the scope of his employment or in the furtherance of his master's business, so as to make the railroad liable therefor under the Act?

Petitioner submits that the answer to each of those questions is "No" as matter of law.

If "No" is not the answer to those questions as matter of law—if they can both be answered "Yes"—then a third question arises:

3. Under the evidence in this case can it be correctly held that the malicious homicide, or murder, of the fireman by

the engineer, was *in fact* within the scope of his employment or in the furtherance of his master's business?

The answer to that question, if it is reached, is plainly "No," under the decisions of this Court.

Pleadings.

Two grounds of asserted liability of petitioner were presented by respondent's complaint (R. 5-10):

1. That Engineer Black was a turbulent and violent person in his conduct toward other employees and habitually carried a pistol about his person in the performance of his duties, of which facts petitioner's superior officers had knowledge and notice and that petitioner was negligent in retaining Black in its employ.

2. That Engineer Black threatened and abused the deceased in giving orders about the use by the deceased of the water injector of said locomotive; and, in attempting to enforce his orders as to the injector, that he negligently shot the deceased *twice*, while both the engineer and the fireman were engaged in the work assigned to them and while Black was in the actual scope of his agency as engineer; and that Black, while acting within the scope of his agency and employment, shot the deceased in enforcing his orders and instructions as engineer, *while the fireman was using the coal scoop in the performance of his duties.* (Italics ours.)

No evidence was offered by respondent to sustain the *first* above ground, and it was specifically abandoned below (R. 4, 52). Only the *second* above ground remains in the case to support the judgment below. (R. 52.)

Trial.

All of the evidence is respondent's. Petitioner offered no evidence. At the close of the evidence petitioner moved for directed verdict. Its motion was overruled. The jury returned a verdict of $30,000 against petitioner, upon which judgment was rendered by the trial court, and petitioner ap-

pealed, relying on its motion for directed verdict and on the overruling thereof. See *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 479-480.

The Evidence.

In its opinion the court below gave a very fair summary of the evidence (R. 53-55), which we quote. We insert in our own footnotes certain matters which we have taken from the record evidence, in order to clarify or to make more exact what the court below said about, or quoted from, the evidence, and we italicize certain matters for emphasis.

"Charles W. Ambrose, an employee of the appellant, testified that he was supply man at the roundhouse of appellant at Greenville, S. C.; and in preparing the engine on which Black and Jester were the engineer and fireman, respectively, to go on the run, he placed a machinist hammer on the righthand side of the watertank, the engineer's side, and that this hammer was there when the engine left the roundhouse; that it was usual or customary to place such a hammer on the watertank or engine when it was going out on a trip, but it could be put on either side of the watertank.

"G. H. Short, the conductor on the train, testified that between Greenville, the starting point of the train, and the place of the shooting, about half way between Wellford, S. C., and Lyman, S. C., it was necessary for the engine to do considerable shifting of cars in the placing of empty cars and the picking up of loaded cars at various points; that he rode in the engine out of Greer, S. C., to a siding near there, and noticed the hammer on the corner of the tank on the engineer's side; that at Wellford, while the train was stopped and he was in the telegraph office, he heard the engineer and fireman 'fussing' with each other, at which time they were on the engine, but both got off the engine on to the ground on the opposite or farther side of the engine from the telegraph office (the record does not disclose if this was the engineer's or fireman's side of the engine); that he went out where they were and inquired as to the

trouble between them, and the engineer said he had told the fireman to keep his hands off the water injector, and he wouldn't do it; that the injector puts cold water in the boiler, which is necessary to the operation of the engine, and there is one both on the engineer's and fireman's side, so that either can conveniently operate it; that the injector is operated by the pulling down of a lever; that it is usually a matter of mutual understanding as to which would operate the injector, but that the engineer, being in charge of the engine, had the authority to elect if it should be used solely by himself; that it was necessary that this injector be operated every fifteen or thirty minutes; *that he told them to*[1] *get back on the engine and get their work done, and after arguing again as to which would first get back on the engine, the fireman finally preceded the engineer*, and considerable shifting of cars was done in and around Wellford and the train proceeded to a pass track where the shooting took place; that this[2] was about one and one-half hours after the trouble between the engineer and the fireman at Wellford; that the train was backed up the main line to said passing track, and upon reaching the switch to the pass track the train was stopped to open the said switch; that as the train was backing in on the pass track, *the engine and cars came to a stop without any signal so to do*, which attracted his attention to the engine; *that he saw the engineer get off the seat box and heard him and the fireman quarreling;* that he was then about one hundred and sixty feet away; that he started walking back toward the engine and when he had walked the length of one car, forty feet, he heard a shot fired, and the fireman exclaim, 'Oh, Lord, Dick,' and then[3] a second shot was fired; that 'Dick' was the engineer; that following the second shot, 'I saw the bulk of something come out of the engine to the ground; I don't know whether it fell out or jumped out; and I kept going

[1] "quit their fussing and" (R. 17).

[2] the shooting, at the pass track (R. 21).

[3] "at that moment" (R. 19).

up that way and when I got in a couple of car lengths of the engine the engineer got up off the ground and came back meeting me, or apparently from the ground; and I said, "You have played the devil now," and he said,[4] "He was after me with a hammer, "; that the engineer said they came out of the engine together; that Jester was[5] in a dying condition when he reached him, and there was no hammer on the ground where he was lying; that another train was coming, so he instructed the engineer to back the train and get in the clear; that upon getting on the engine he looked for the hammer and it was on the same corner of the tank where he had seen it earlier at Greer; that he called the engineer's attention to the hammer on the corner of the tank, and the engineer said: 'How come that there, when he struck at me, I throwed my arm and it fell over there'; *that the fireman's cap and glove, and the coal scoop were on the deck of the engine (the floor of the engine) about the center.*[6]

"The widow of Jester (also the respondent herein in her representative capacity) testified as to her dependency and that of their children upon the earnings of the deceased, and the amount thereof, etc., and exhibited in court the overalls and overall jumper worn by Jester at the time he was shot and killed, which bore evidence of a bullet hole over the right hip, and one on the left side just about the middle of the pocket of the overall jumper.

"The testimony showed that the engineer, Black, weighed about 250 pounds and that the fireman, Jester, weighed between 135 and 140 pounds, and both appeared to have normal health, but we attach no particular importance to the difference in weight of the two men.

"It was on the foregoing testimony that appellant's motion for a directed verdict was overruled, and the case submitted to the jury."

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[4] "I had to do it" (R. 24).

[5] on the ground (R. 19).

[6] "all laying there together" (R. 22).

Aside from what the court below said, as above quoted, about the evidence, we may mention the following facts, disclosed by undisputed evidence or testimony on direct and cross-examination, but not noticed by the court below. It summarized only the direct examinations, not noticing the cross.

After the train was got in the clear an ambulance was called for the deceased, Jester. The conductor reported to the superintendent by telephone what had happened, and officers came out later and arrested Mr. Black, the engineer. (R. 21.)

Respondent offered in evidence the following rules of petitioner (R. 22-23):

> "1292. They (engineers) are responsible for proper handling of the engines for care of equipment; economical use of fuel and supplies; the performance of duty by their firemen, instructing them when necessary; report incompetence or neglect of duty to proper officer."
>
> "1324. They must instruct firemen as to the operation and care of engines, and may allow them to handle the engine at stations, under their supervision."
>
> "1365. Firemen will report to the Train Master, Superintendent and Master Mechanic in their respective departments. Within shop and engine house limits they must obey the orders of the foreman. When with an engine they must obey the orders of the engineman."

On cross-examination the conductor testified:

When the "bulk" came toppling out of the engineer's side of the engine, he saw only one bulk. That would suggest they were grappling together and came out. And that was on the engineer's side. (R. 24.)

> Q. And you say Mr. Jester was on the ground and the only sign of life was a little sort of rattling in his throat?
>
> A. Yes, sir.
>
> Q. And he was dead in no time, was he not?

A. When I got the train in the clear and got back he was dead.

Q. Did he ever show any signs of consciousness?

A. No, sir, he never did move. (R. 25-26.)

Re-direct:

Q. Mr. Short, the throttle and brakes are on the engineer's side?

A. Yes, sir.

Q. So that only he could stop the engine?

A. Yes, sir. (R. 27.)

The Mortuary (*sic*) Table, Section 735, Code of South Carolina, was put in evidence. (R. 31.)

The foregoing comprises all of the material evidence.

Petitioner's Motion for Directed Verdict.

Petitioner's (defendant's) motion for directed verdict was as follows (R. 31-32):

> "The defendant moves for a directed verdict upon the following grounds:
>
> "1. Because the plaintiff has failed to establish by the preponderance of the testimony any actionable negligence on the part of the defendant or its agents or servants which would sustain a verdict against the defendant.
>
> "2. Because the testimony fails to show that the death of plaintiff's intestate was due to the act of an agent or servant of the defendant, acting within the scope of his agency, and in furtherance of the defendant's business.
>
> "3. Because the testimony is susceptible of no other reasonable inference than that the act of the engineer in taking the life of plaintiff's intestate, was done for purely personal reasons and not in the course of his employment or in furtherance of the master's business.
>
> "4. Because a verdict against the defendant could be predicated purely upon conjecture, since the testimony fails to establish by the degree of proof required that the engineer at the time he took the life

> of plaintiff's intestate was acting within the scope of his authority or in the furtherance of the master's business."

Each of the grounds upon which the motion was based was specifically preserved and presented to the court below by petitioner's exceptions. (R. 48-50.)

The Decision Below.

It Was Erroneous.

Upon all the evidence, there were two, and only two, ultimate conclusions which might have been reached by the jury and by the court below, either:

> 1. That Engineer Black killed Jester acting in his own legitimate self-defense, when Jester was attacking him with a hammer; or
>
> 2. That Black did not act in legitimate self-defense, in which case he was guilty of wilful and malicious homicide or murder.

Obviously, if Black was acting in legitimate self-defense, he was not guilty of negligence. It would be negligence not to defend himself against a felonious assault.

Obviously, the jury and the court below rejected the self-defense alternative. The trial court specifically charged the jury that, if it found that Jester was violently assaulting Black and thereby caused Black to shoot and kill him, respondent could not recover (R. 44). We think the rejection of the self-defense alternative was probably correct, in view of the evidence that the hammer was in the same position before and after the shooting, in view of Black's lame attempt to explain this incriminating circumstance, and especially in view of the fact that Black shot Jester twice and shot him in the back. The first shot might have been, though it probably was not, in self-defense. The second shot was murder or at least, wilful homicide.

It results that the inescapable conclusion is that Black did not act in legitimate self-defense, but committed murder or wilful homicide, without justification. It is in that aspect that the legal questions arising must be decided.

The court below, treating the case in that aspect, based its decision on the supposed authority of the decisions of this Court in *Jamison* v. *Encarnacion*, 281 U. S. 635, and in *Alpha Steamship Corp.* v. *Cain*, 281 U. S. 642. Those cases are entirely distinguishable from this case because:

1. Neither of those cases involved murder, wilful homicide, or murderous assault. If it be argued that this distinction is only a question of difference in degree of crime, or in degree of result, the answer is, as said by Mr. Justice Holmes, in *Irwin* v. *Gavit*, 268 U. S. 161, 168:

> "Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law."

and as said by Chief Justice Stone, in *Harrison* v. *Schaffner*, 312 U. S. 579, 583:

> " 'Drawing the line' is a recurrent difficulty in those fields of the law where differences in degree produce ultimate differences in kind. See *Irwin* v. *Gavit*, 268 U. S. 161, 168."

Nothing is more familiar in the law than the ultimate differences in kind, dependent upon the differences in degree, between simple, non-murderous, though wilful, assault, such as was involved in the *Encarnacion Case* and in the *Alpha Steamship Case*, and intentional, malicious homicide, or murder, such as is involved in our case, or the differences in degree, and hence in kind, in homicide itself, manslaughter, murder in the second degree, murder in the first degree.

2. The simple, non-murderous, assaults committed by the superior against the inferior servants in those cases were both undisputedly committed in the furtherance of the master's business—in the *Encarnacion Case*, "to hurry him about the work" (p. 638), and in the *Alpha Steamship Case*,

"for the purpose of reprimanding him for tardiness and compelling him to work" (p. 643). The murderous assault by shooting twice with a pistol, in our case, could not have been made with any purpose to hurry Jester with his work or to compel him to work. Its only purpose and only possible effect were to impose capital punishment upon him and completely to stop him from work, *to put an end entirely to the furtherance of the master's business until Jester's remains could be disposed of, Black could be arrested, and a new engine crew provided.* This result was inescapable from the very nature of Black's act, and no other could have been anticipated.

3. The assaults involved in the *Encarnacion Case* and in the *Alpha Steamship Case* were committed on seamen on shipboard, where, from the very nature of the situation of confinement and discipline, as carefully pointed out by this Court in *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 377-378, "conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties," where " 'the ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly,' " and since "Congress did not mean that the standards of legal duty must be the same by land and sea." Care must be taken, if the law is not to be warped, not to push the doctrine of the *Encarnacion Case* and of the *Alpha Steamship Case* too far, as applied to land liability of railroads. We submit the court below pushed that doctrine too far.

4. The *Encarnacion Case* and the *Alpha Steamship Case* turned, in last analysis, upon a rule of liberal and reasonable construction of the word "negligence" in the Federal Employers' Liability Act, *as applied to seamen on ships*, "wards of admiralty," rejected a construction "narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning" and held that the Act must be "construed liberally to fulfill the purposes for which it was enacted * * *" (281 U. S. at 640). But, in *B. & P. Steamboat Co.* v. *Norton*, 284 U. S. 408, 414, this

Court characterized that rule of construction as being one for the liberal construction of the Act in furtherance of its purpose "and, if possible, so as to avoid incongruous or harsh results." Nothing could produce a more incongruous or harsher result than to push that rule of construction to the point of holding a railroad liable, as for "negligence," for the malicious, unprovoked, wilful homicide or murder of a fireman by an engineer, on the facts of this case. Reasonableness, as a rule of construction, works both ways. It is not a one-way street. Neither is liberality.

5. Upon a very careful research no case has been found in any state or federal court, since the state court decisions reversed by this Court in *Davis* v. *Green*, 260 U. S. 349, and in *Atlantic Coast Line R. R. Co.* v. *Southwell*, 275 U. S. 64, holding a railroad liable for a wilful homicide of an employee by another employee or extending the doctrine of the *Encarnacion* and *Alpha Steamship Cases* to such a situation. All the authority is to the contrary. Indeed, a railroad is not liable, under this Court's decisions, for the wilful killing of an employee by outsiders, strikers or robbers. See *St. Louis, etc., R. Co.* v. *Mills*, 271 U. S. 344; *Atlanta & Charlotte Air Line R. Co.* v. *Green*, 279 U. S. 821, reversing, *per curiam*, 151 S. C. 1, 148 S. E. 633, on authority of *Davis* v. *Green*, *supra*, *St. Louis, etc., R. Co.* v. *Mills*, *supra*, and *Atlantic Coast Line* v. *Southwell*, *supra*.

On the above five grounds we submit that this case is wholly distinguishable from *Jamison* v. *Encarnacion* and from *Alpha Steamship Corp.* v. *Cain*, and that the court below erred in holding those cases to be controlling here.

On the contrary, *Davis* v. *Green*, 260 U. S. 349, is controlling, on the facts of that case and on the facts in this case. In principle they are indistinguishable. Yet the court below refused to follow *Davis* v. *Green*.

In that case, as in this, an engineer committed a wilful homicide on a fellow servant. He first upbraided a negro switchman for repeating signals when the engineer had told

him to give a signal but once. The negro told him that he was doing his duty as best he could under instructions of the conductor (the deceased). Thereupon the engineer, in a rage, told the negro that he would kill him and the conductor. He then knocked the negro switchman off the running board with a hammer, incapacitating him so that he had to be sent to a hospital. The engineer moved the train on to a switch, which had to be thrown before he could proceed; so he stopped the engine, waiting for the throwing of the switch, which could not be done by the switchman whom the engineer had himself incapacitated. Accordingly the conductor proceeded from the cars toward the switch, to throw it. The engineer came down from his engine with a pistol and took his stand near the front of the engine, and, as the conductor came up, accosted him with the remark, "Why in the hell have you not thrown the switch?" He then fired the pistol *two or three times, killing the conductor.* (See 125 Miss. 476, 87 So. 649.)

There was also, in that case, evidence that the engineer was a vicious, quarrelsome and dangerous man and that the railroad retained him in its employ with knowledge thereof, *a ground of liability which has been abandoned in our case.* (See 87 So. at 651.)

Reversing a judgment of the Supreme Court of Mississippi which had affirmed a judgment against the railroad in favor of the administratrix of the deceased conductor, this Court, in *Davis* v. *Green*, 260 U. S. 349, in a unanimous opinion by Mr. Justice Holmes, said (pp. 351-352):

> "Whatever may be the law of Mississippi a railroad company is not liable for such an act under the statutes of the United States."

This Court has reaffirmed *Davis* v. *Green* in *St. Louis, etc., R. Co.* v. *Mills*, 271 U. S. 344, 346; *Atlantic Coast Line R. R. Co.* v. *Southwell*, 275 U. S. 64, 65; *Atlanta & Charlotte Air Line R. Co.* v. *Green*, 279 U. S. 821; and *Chesapeake &*

Ohio Ry. Co. v. *Bryant*, 280 U. S. 404; and it has never, in any subsequent decision, so far as we can find, cast any doubt upon that leading case.

Mr. Justice Butler's opinions in *Jamison* v. *Encarnacion*, 281 U. S. 635, and in *Alpha Steamship Corp.* v. *Cain*, 281 U. S. 642, cast no doubt whatsoever upon the soundness of the decision in *Davis* v. *Green* or in the other cases which have followed it. In fact neither *Davis* v. *Green* nor any of the cases which have followed it was mentioned in the *Encarnacion Case* or in the *Alpha Steamship Case*. Obviously this Court did not deem the *Encarnacion Case* and the *Alpha Steamship Case* to be assimilable to *Davis* v. *Green* and the cases which have followed it.

It is clear that *Davis* v. *Green* and the cases following it are controlling of our case, unless they have all been overruled *sub silentio* by the *Encarnacion Case* and the *Alpha Steamship Case*, and that has never been suggested by this Court or, so far as we can find, by any other court.

The court below did not suggest such *sub silentio* overruling. In fact it said expressly that it did not regard the *Encarnacion Case* and the *Alpha Steamship Case* as being in conflict with *Davis* v. *Green* (R. 55). Yet it made no effort to distinguish this case from *Davis* v. *Green* or to demonstrate how this case was controlled by the *Encarnacion Case* and the *Alpha Steamship Case*. It simply preferred to follow the non-applicable doctrine of those later cases and refused to follow the applicable doctrine of *Davis* v. *Green* and of the cases in which this Court has followed and reaffirmed that leading case. (R. 55-57.)

Davis v. *Green* has been followed also in: *Birks* v. *United Fruit Co., Inc.* (D. C., N. Y.), 48 F. (2d) 656, distinguishing *Jamison* v. *Encarnacion;* in *American Ry. Express Co.* v. *Tait*, 211 Ala. 348, 100 So. 328, 330; in *McCarty* v. *Mitchell*, 169 Miss. 82, 151 So. 567, 569, a case quite analogous on the facts to ours, although it did not involve homicide, but only

a murderous assault; in *Ward* v. *Southern Railway Co.*, 206 N. C. 530, 174 S. E. 443, 444; in *Popadines* v. *Davis* (App. Div.), 209 N. Y. S. 689, 691, a "skylarking" injury case; in *Johnston* v. *Atlantic Coast Line R. Co.*, 183 S. C. 126, 190 S. E. 459, 463; in *Osment* v. *Pitcairn*, 349 Mo. 137, 159 S. W. (2d) 666, 668, certiorari denied for want of jurisdiction, 317 U. S. 587, a rough "horseplay" injury by a fellow servant on a railroad, also distinguishing *Jamison* v. *Encarnacion;* and in *Quinn* v. *American Range Lines*, 344 Pa. 85, 23 A. (2d) 487, 489, certiorari denied 316 U. S. 677, following *Davis* v. *Green* and distinguishing *Jamison* v. *Encarnacion.*

The decision of this Court in the recent case of *De Zon* v. *American President Lines*, 318 U. S. 660, teaches us that it is still the law that evidence of negligence may be insufficient for submission to a jury, even in a seaman's case, and it cites *Jamison* v. *Encarnacion* (318 U. S. at 671) to the proposition that damages may be recovered under the Jones Act only for negligence.

Jamison v. *Encarnacion* has been distinguished, on facts often analogous to those in our case, in the following: *Escandon* v. *Pan American Foreign Corp.* (D. C., Tex.), 12 F. Supp. 1006, 1007, affirmed (C. C. A., 5th), 88 F. (2d) 276, drunken seaman handcuffed and confined to quarters to prevent him damaging the ship, its contents, and persons on board, held not entitled to recover damages against the employer; *Lykes Bros. S. S. Co.* v. *Grubaugh* (C. C. A., 5th), 128 F. (2d) 387, 391, assault on steward by chief engineer in personal quarrel and to show him "who has authority aboard this vessel," evidence insufficient for submission to jury on issue whether assault was in furtherance of master's business (compare *Nelson* v. *American-West African Line* (C. C. A., 2d), 86 F. (2d) 730, where drunken boatswain assaulted a sleeping seaman, saying, "Get up, you big son of a bitch, and turn to"); *Yukes* v. *Globe S. S. Corp.* (C. C. A., 6th), 107 F. (2d) 888, seaman injured in fight

with third assistant engineer starting with an accidental bumping by a door, but where the latter, when he first swung at the seaman, repeatedly asserted, "I am an officer of this ship; I will show you what I mean," affirmed district court in directing verdict for the Steamship Company, saying the *Alpha Steamship Case* (in 35 F. (2d) 717, affirmed, 281 U. S. 642) and *Nelson* v. *American-West African Line*, 86 F. (2d) 730, "mark, however, the limits within which evidence has been held to warrant inference of authority, actual, asserted, or intended, to be exercised by subordinate officers in the business of the ship, leading to assaults upon seamen."

The trend of authorities is well illustrated by the recent decision by the United States Court of Appeals for the District of Columbia in *Park Transfer Co.* v. *Lumbermen's Mutual Casualty Co., et al.*, decided April 24, 1944, App. D. C. , F. (2d) . That decision reversed the action of the district court in refusing to grant a directed verdict for defendant company in a suit seeking to recover damages, as for negligence, for the killing by a felonious assault by defendant's employee of an employee of another company engaged on the same construction work. Smith, a negro, was an employee of Park Transfer Company. Jett was a steamfitter foreman of Norair Engineering Corporation. Both corporations were contractors in the construction of the same building. Smith drank from a pail which belonged to employees of the Norair Corporation. Jett shouted, "Nigger, stay away from that water bucket." Smith, the negro, struck Jett on the head with a six-foot steel pipe and killed him.

Norair's insurance carrier, appellee Casualty Company, paid workmen's compensation to Jett's widow and then brought suit against Smith's employer, appellant Park Transfer Company, to recover damages for the alleged negligent killing by Smith. The Court of Appeals of the District held that as a matter of law the killing of Jett by

Smith was not within the scope of Smith's employment and that the evidence did not support an inference that he was actuated by any other motive than purely personal revenge for Jett's insult. Accordingly, it held Park Transfer Company was not liable to the insurance carrier. It said:

> "Where water is plentiful, a man does not break another's skull in order to get it."

We submit that the court below was unwarranted in refusing to follow *Davis* v. *Green*, 260 U. S. 349, and *Atlantic Coast Line R. R. Co.* v. *Southwell*, 275 U. S. 64, and in holding this case to be ruled by *Jamison* v. *Encarnacion*, 281 U. S. 635, and *Alpha Steamship Corp.* v. *Cain*, 281 U. S. 642.

The court below cited *Brady* v. *Southern Railway Co.*, 320 U. S. 476, and gave lip-service to the controlling principles of law there laid down, including the rule that the evidence must be more than a scintilla before a case under the Federal Employers' Liability Act may be properly left to the discretion of a jury (R. 58-59), yet it sustained recovery in this case in which, we submit, there was not a scintilla of evidence that the shooting and killing of respondent's intestate was, or could have been, committed within the scope of the engineer's employment or in the furtherance of petitioner's business.

The court below, in its opinion (R. 59-60), seemed to treat this Court's most recent decision in *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, as being a blanket warrant for submission of any evidence, however speculative or conjectural, to a jury, and as having overruled, again *sub silentio*, *Brady* v. *Southern Railway Co.*, 320 U. S. 476. That, we submit, was error. This Court, in the *Tennant Case*, suggested no doubt whatsoever as to the soundness of the decision in the *Brady Case*. It did not even refer to the *Brady Case*, evidently not deeming the two cases assimilable on the facts and not deeming the decision in the *Tennant Case* inconsistent with that in the *Brady Case*.

That the court below was controlled in its decision in this case by a misinterpretation of the scope and effect of this Court's opinion in the *Tennant Case*, seems clearly indicated from the language of the following order entered by the Chief Justice of the court below, in connection with the overruling of petitioner's petition for rehearing in that court (R. 65), in which order it was said:

> "In the preparation of the opinion in this case, the Court considered all matters referred to in the attached petition for a rehearing, and while frankly admitting that the issue involved is close and not free from doubt, yet in the light of the broad language used in Tennant vs. Peoria & Pekin Union Ry. Co., we adhere to the opinion as filed. In so doing we have the consoling thought that appellant has the further right of appeal to the Supreme Court of the United States, which Court, if it did not intend to narrow the rule as to the granting of nonsuits and direction of verdicts in the Tennant case, can with impunity reverse this Court.
>
> "Petition refused."

That the court below indulged, and held the jury warranted in indulging, a pure speculation or conjecture on the evidence, as ground for holding that the murderous act of Black was committed in the scope of his employment or in the furtherance of petitioner's business, is readily demonstrable.

The complaint alleged two wholly inconsistent theories as to this: (1) that Black shot and killed Jester in the effort to enforce his order to him not to operate the water injector; (2) that Black shot Jester while the latter was using the coal scoop in the performance of his duties as fireman (R. 8-10, see *supra*, p. 3).

Both could not have been true. Either Black shot and killed Jester in connection with the fireman's operation of the water injector, in which case Jester was on or at his seat box on the left side of the locomotive, or he shot and killed him while Jester was on the deck in front of the

fire box engaged in his duty of tending the fire with the coal scoop.

The evidence seems conclusive that the latter was true, since, as the court below showed, Jester's cap, glove and coal scoop were found on the deck of the engine lying together about the center. It is inescapable that he was shot while tending the fire with the scoop, not while he was operating or attempting to operate the injector.

But there is complete absence of evidence that there was any dispute between the two as to how Jester was to tend the fire. The dispute upon which the jury and the court below relied was one which had occurred an hour and a half earlier, at Wellford, which was about the use of the injector.

However, there is no evidence that that original dispute continued throughout the hour and a half and motivated the later shooting. Nothing but pure conjecture can support such theory. In fact, such evidence as there is clearly negatives that theory, since another and wholly different dispute intervened between the injector dispute and the shooting. When the conductor told them to quit fussing (about the injector) and get back on the engine and get their work done, Black and Jester started a wholly new and different dispute, as to which one should precede the other in getting back on the engine. That was a purely personal, grudge dispute between the two, wholly unrelated to any furtherance of the master's business.

If *posteriori hoc ergo propter hoc* be a valid inference from evidence rather than a pure conjecture—and the court below treated it as such as applied to the original injector dispute—then it applies rather to the latest dispute preceding the shooting; and that had nothing to do with the injector or with the manner of firing the engine or with anything related to petitioner's business, but was a purely personal dispute as to precedence in remounting the engine.

a killing in the pursuance of which could not have been "anything but a wanton and wilful act done to satisfy the temper or spite of the engineer." *Davis* v. *Green*, 260 U. S. 349, 351. And for such killing petitioner cannot be liable.

The crux of the decision below, on the evidence, is the following, in which the court below clearly indulged pure speculation or conjecture to sustain the verdict:

> "One and one-half hours prior to the shooting, the engineer and fireman had been in a violent quarrel over the use of the water injector by the fireman on the fireman's side of the engine, and according to the statements made to the conductor, although the engineer had ordered the fireman to desist from the use of the injector, which he had the right to do, the fireman had repeatedly used the injector.[7] The evidence further shows that when the fireman and engineer got back on the engine upon being ordered to do so by the conductor, both were angry,[8] and there was no reason to believe that the fireman would thereafter strictly obey the order of the engineer about the non-use of the injector.[9] We cannot say as a matter of law that it was not a reasonable inference, without entering upon the field of speculation, that immediately prior to getting off the fireman's seat to fire the engine, the fireman again pulled the lever of the water injector on his side of the engine, and that upon this coming to the attention of the engineer, he shot the fireman." (R. 61.)

If ever a decision was based upon pure conjecture or speculation and embodied the "mischance of speculation over

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[7] This was an exaggeration of the testimony. All that the conductor testified the engineer said was, "he told the fireman to keep his hands off the injector and he wouldn't do it" (R. 16).

[8] But what they were then angry and arguing about was "which one would get on the engine first" (R. 17). The fireman actually got on first, and, if *posteriori hoc ergo propter hoc* may substitute for evidence, then it would seem that the engineer killed the fireman because the latter had preceded him on the engine.

[9] Evidently meaning that in the absence of evidence *disproving* the fact it must be presumed. This erroneously puts the burden of proof on the petitioner.

legally unfounded claims" (*Brady* v. *Southern Railway Co.*, 320 U. S. 476, 480, and cases cited), that decision does.

There is no evidence whatsoever that "immediately prior to getting off the fireman's seat box to fire the engine, the fireman again pulled the lever of the water injector," and the suggestion is a pure conjecture based solely on a state of mind which had existed an hour and a half before and when the evidence *does show* that a wholly different state of mind, a new argument about a wholly new subject-matter, later intervened.

Even indulging that unwarranted conjecture, still the killing was not in the furtherance of the master's business. If the engineer shot and killed the fireman while the fireman was tending the fire and after he had immediately previously again pulled the lever of the injector, then the engineer's murderous act could not have been intended or calculated to prevent the act which the fireman had already done. It was capital punishment for a past act of disobedience, which cannot be within the scope of employment or in furtherance of the master's business, but is *ex propria vigore*, "a wanton and wilful act, done to satisfy the temper or spite of the engineer" (260 U. S. at 351).

The very Company Rule 1292 which respondent offered in evidence (R. 22) makes crystal clear what was the duty of the engineer in case of such (conjectured) insubordination by the fireman. That duty was: "report incompetence or neglect of duty to proper officer." It was no part of the duty of the engineer to kill the fireman for an act which the court below conjectured the latter might have done.

As we have pointed out, the only possible intention or effect of the shooting and killing was to put a complete stop to the master's business, not to further it.

The decision below makes petitioner an insurer against malicious, wanton and wilful homicide of one of its employees by another done to satisfy his temper or spite. The

court below recognized that its decision, on the conjectural aspect of the evidence above described, "is not free from doubt" (R. 61).

II.

JURISDICTION.

The date of the judgment sought to be reviewed is April 7, 1944 (R. 51). It became final on April 28, 1944, when the court below overruled petitioner's petition for rehearing (R. 65, 67).

The jurisdiction of this Court is invoked on the ground that petitioner claimed immunity from liability, and asserted rights, under a statute of the United States, i. e., the Federal Employers' Liability Act (35 Stat. 65, 36 Stat. 291, 53 Stat. 1404), 45 U. S. C. 51-59, which claims and rights were denied by a final judgment of the highest court of the State of South Carolina; jurisdiction being therefore invoked under Section 237 of the Judicial Code, as amended, 28 U. S. C. 344 (b). *Brady* v. *Southern Railway Co.*, 320 U. S. 476. *Tennant, Admrx.*, v. *Peoria & Pekin Union Railway Co.*, 320 U. S. 721, certiorari granted.

The pertinent provisions of the Federal Employers' Liability Act are as follows:

> "That every common carrier by railroad while engaging in commerce between any of the several States * * *, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * *, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *."

III.

QUESTIONS PRESENTED.

The three questions presented are stated on pages 2, 3, *supra.*

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision below is in conflict with this Court's decisions in *Davis* v. *Green*, 260 U. S. 349, and in *Atlantic Coast Line R. R. Co.* v. *Southwell*, 275 U. S. 64, and is contrary to the principle and effect of this Court's decisions in *St. Louis, etc., R. Co.* v. *Mills*, 271 U. S. 344, and *Atlanta & Charlotte Air Line R. Co.* v. *Green*, 279 U. S. 821; and is not warranted by this Court's decisions in *Jamison* v. *Encarnacion*, 281 U. S. 635, and *Alpha Steamship Corp.* v. *Cain*, 281 U. S. 642, nor by its decision in *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, upon all of which the court below relied.

2. The decision below is in conflict with this Court's decisions in *Brady* v. *Southern Railway Co.*, 320 U. S. 476, 480, and in the cases there cited, in that it affirmed a judgment on a verdict unsupported by any evidence or by anything more than a scintilla of evidence, and which was based upon pure speculation or conjecture.

3. Whether *Jamison* v. *Encarnacion*, 281 U. S. 635, and *Alpha Steamship Corp.* v. *Cain*, 281 U. S. 642, had the effect of overruling, *sub silentio*, *Davis* v. *Green*, 260 U. S. 349, and *Atlantic Coast Line R. R. Co.* v. *Southwell*, 275 U. S. 64, and whether their doctrine may properly be extended to cover wilful homicide of a railroad employee by a fellow employee, on the facts in this case, under the Liability Act, is a question of law of public importance which has not been, but should be, settled by this Court.

4. The decision below casts grave doubt upon the scope and effect of the most recent case decided by this Court under the Liability Act, *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, and casts doubt upon *Brady* v. *Southern Railway Co.*, 320 U. S. 476, as a precedent.

5. The decision below has imposed upon petitioner a liability which Congress did not intend or authorize by the Liability Act and which is not within the remedial purposes of that Act.

It is believed that the foregoing petition adequately presents the questions raised, the reason relied on, and the pertinent authorities, without the necessity of filing a supporting brief, such as is permitted, but not required, by Rule 41 (4), and which brief, if filed, would necessarily involve repetition.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted and the judgment below reversed.

SOUTHERN RAILWAY COMPANY,
Petitioner.

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Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 147

SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

PAULINE G. JESTER, AS ADMINISTRATRIX OF THE ESTATE OF CLAUDE V. JESTER, DECEASED, *Respondent*.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

JAMES H. PRICE,
JAMES D. POAG,
GREENVILLE, S. C.
Attorneys for the Respondent.

SUBJECT INDEX

TABLE OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 147

SOUTHERN RAILWAY COMPANY, *Petitioner*

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v.

PAULINE G. JESTER, as Administratrix of the Estate of Claude V. Jester, deceased, *Respondent*

PRELIMINARY STATEMENT

On June 30, 1943, the respondent herein, as Administratrix of the intestate estate of Claude V. Jester, brought action against the petitioner, Southern Railway Company, under the Federal Employers' Liability Act for the death of her husband on July 28, 1942. The complaint alleged that her husband, who was the father of her two minor children, Mary Elizabeth, age 11 years, and Vestel, Jr., age 5 years, had been shot and killed by his engineer, C. H. Black, while both were engaged in the active discharge of their duty upon one of petioner's freight trains.

The case came on for trial in the Greenville County Court of Common Pleas on September 22, 1943, before Circuit Judge the Honorable E. C. Dennis, and a jury. At the conclusion of the evidence, petitioner's counsel made a motion to the trial Judge for a directed verdict upon grounds shown in the rec-

ord. This motion was refused. Full argument was made by counsel for both parties to the jury and after an able and complete charge by the trial Judge, as to which the petitioner has never raised the slightest question, the jury, on September 22, 1943, returned a verdict for respondent for $30.000. Petitioner noted a motion for a new trial, which was argued on October 21, 1943, and was made upon the ground set forth in the record, namely, that respondent had failed to produce evidence sufficient to make a jury issue that the engineer at the time he shot and killed the deceased was acting within the scope of his agency. On October 22, 1943, Judge Dennis passed an Order, set forth in the record, overruling this motion. Petitioner then appealed to the State Supreme Court. That Court heard the appeal on March 14, 1944. On April 7, 1944, a unanimous opinion of the Supreme Court was filed affirming the verdict and judgment below. The opinion is printed in full in the record. Within the time allowed by law, petitioner filed a petition for rehearing, which is set forth in the record. Thereafter, the State Supreme Court dismissed the petition for rehearing and petitioner at once gave notice that it would apply to this Court for a Writ of Certiorari to the Supreme Court of the State of South Carolina.

QUESTION PRESENTED

"The sole issue in this appeal is whether or not the testimony adduced upon the trial of the case was sufficient to require the submission to the jury of the question if the engineer, C. H. Black, in the shooting of C. V. Jester, the fireman, was acting within the scope of his agency and in the furtherance of the appelant's business." (This is the exact language of the unanimous opinion of the South Carolina Supreme Court in this case. See Record, Pages 52-53). It had likewise been the sole issue upon which the petitioner's counsel presented the case to the trial Court in Greenville County; it was the sole ground upon which counsel asked an experienced State Circuit Judge for a new trial.

Now, in an adroitly worded petition, counsel for the peti-

tioner seek to greatly widen the issue and insert other matters, such as the difference between a simple assault and a wilful or malicious assault, and that a homicide committeed by an employee is not covered by the Federal Employers' Liability Act.

Petitioner will not be permitted by an avalanche of words to change a simple issue of fact into much more complicated questions of law.

STATEMENT OF FACTS

The statement of facts given by the South Carolina Supreme Court at pages 53 to 55 of the record, is reasonably brief and clear. To this statement of facts we would make one or two additions.

We think the most significant fact that underlies this whole case is that the testimony shows that the engineer and fireman were apparently on the best of terms before that particular time. The conductor, G. O. Short, testified that up to that time he had never noticed any trouble at all between the two men. (Record, Folio 53, page 16). He further stated that the engineer did not report to him that they had differed about anything except the water injector. (Record, Folio 57, Page 17).

Other than these references, the record is utterly silent and we have a right to assume that the men had never had any misunderstanding about any personal or private matter. The only issue between them was the question of the use of the water injector and the record positively shows that each side of the engine was equipped with an injector. (Record Folio 54, Page 16).

Second: We shall also add an enumerated list of facts and circumstances which the trial Court and jury had before them upon the issue of whether or not the engineer was acting within the scope of his agency at the time, to-wit:

(1) He (the engineer) was employed principally to oper-

ate steam engines for the Southern Railway Company — (Folio 80).

(2) He was engaged in this particular duty at the precise moment in question. He stopped the engine, got down off of his seat and in two or three seconds shot the deceased— (Folios 63, 65, 85, and 89).

(3) He was charged with the duty of instructing and ordering the fireman in the performance of his duties —(Folios 80-81).

(4) He was in charge of the engine — (Folio 95).

(5) Only a short time before he informed the conductor that he had ordered the fireman to keep his hands off of the water injector and the fireman "wouldn't do it."—(Folio 52).

(6) The only controversy between the two men was about the use of the water injector. There was an injector on each side of the engine, and no rule forbid the fireman to use the one on his side. — (Folios 53, 54, 55).

(7) No other matter was involved between the two men. There was absolutely no evidence of any difference about personal matters, money obligations or anything else. The water injector was the sole and only cause of dispute between them—(Folio 57).

(8) The railway company offered no evidence at all of any personal difference of any kind between them and there is not even a hint of such difference in the testimony.

(9) The conductor, without attempting to settle the injector issue, ordered the men back to work.—(Folio 57).

(10) As the fireman had asserted his right to use the injector in performance of his duty to keep steam up to the proper guage, the reasonable inference to be drawn is that he continued to do so. — (R. Folio 52).

(11) The operation of the engine required the use of the water injector every fifteen or thirty minutes.—(R. Folio 73, Page 21).

(12) The only reasonable inference to draw from these foregoing circumstances is that the engineer decided to enforce his orders upon the fireman when he continued to use the water injector after the incident narrated by the conductor.—(Folio 52).

(13) The only reasonable inference, or it is at least a most reasonable inference to draw, is that the fireman used the injector, turned water into the engine and got down in front of the fire door to shovel coal when assaulted by the engineer. —(Folios 75, 76 and 84).

(14) The conductor felt the engine stop and looking down the side of the train saw the engineer get off of his seat box —(Folio 63) and saw the engineer disappear from sight in the direction of the fireman's side. — (Folio 85).

(15) Only the engineer could have stopped the engine as the throttle and breaks were on his side—(Folio 97).

(16) The fireman's cap, glove and coal scoop were all found together in the center of the deck of the engine, the deck being the floor space between the engineer's and fireman's seats — (Folios 77 and 84).

(17) The fireman's exclamation, "Oh, Lordy, Dick," was an exclamation of surprise and appeal, not that of a man who had started a fight with a much bigger man.

(18) The statement of the conductor that it appeared that the two were grappled together (Folio 86) merely indicates that in desperation the smaller man, after the first shot, tried to close with his powerful opponent in order to knock aside the pistol. He could never have pushed the huge engineer out of the engine.

(19) The conductor was looking down the sides of the cars and could see the engineer's seat but the fireman, of course, was not in sight. — (Folio 64). This indicates that the engineer went to the fireman and not that the fireman approached the engineer.

All authorities agree that preeminent among the facts and

circumstances to be considered in solving the question of whether or not an agent is acting within the scope of his agency are those of time and place, (35 Am. Jur. page 987), so we add to the facts and circumstances above set forth—

(20) Time—It was in the very midst of the most active hours of duty, both men only a moment or two before the shot was fired having been engaged in their respective duties, the engineer operating the engine and the fireman firing the same.

(21) Place—On the freight engine where both were working, the engineer stopped the engine, went to the deceased who was apparently in the center of the deck—(Folio 84) and the fatal difficulty took place there.

(22) The injector is a lever which the operator pulls down and it puts water in the boiler. It is only a step or two from where the fireman's cap, glove and coal scoop were found in the center of the engine deck—(Record, Folio 54, Page 16).

ARGUMENT

It will be seen that the evidence before the trial Court and jury was both direct and circumstantial. The conductor heard and saw part of the fatal encounter but could not tell the exact words which were spoken between the two men leading up to the shooting. The conductor did testify, however, that not over an hour and a half before the two men were engaged in an argument as to the use of the water injector and there is absolutely no testimony that they ever disagreed about any other matter. The petitioner has contended throughout that the circumstantial evidence, together with the direct evidence, and the legitimate inferences to be drawn from that testimony, made a jury issue as to whether or not the respondent, plaintiff below, had established the allegations of her complaint. Almost every Supreme Court in the United States has held that all issues involved in a negligence case may be established by circumstantial as well as by direct evidence.

One of the leading cases from the United States Supreme Court upon circumstantial evidence in the case like the one at bar is that of *Choctaw, O. & G. R. Co., v. McDade*, 191 U. S. 64; 48 L. Ed., 96; 24 Sup. Ct. Rep. 24, in which the Court said:

> "There was no eyewitness as to the exact manner of the injury to McDade, and it is urged that the court below should have taken the case from the jury because of the lack of testimony upon this point. It was left to the jury under proper instructions to find whether McDade came to his death in the manner stated in the declaration, and the court distinctly charged that, unless satisfied of this, there could be no verdict against the railroad company. While the evidence was circumstantial, it was ample, in our opinion, to warrant the submission of this question to the jury under the instructions given."

Innumerable South Carolina Supreme Court decisions have been rendered along the same line. We cited many such decisions in our Brief before the Supreme Court but will mention only one or two here. One of these South Carolina decisions is that of *Thornton vs. S. A. L. Ry. Co.*, 98 S. C., 348; 82 S. E., 443.

Upon other grounds this decision was reversed by the United States Supreme Court—(238 U. S., 606; 59 L. Ed., 1485; 35 Sup. Ct. Rep. 601).

Another case is that of *Mulligan vs. A. C. L. Ry. Co.*, 104 S. C., 173; 88 S. E., 445. In that case the State Supreme Court sustained a verdict for the plaintiff under the Federal Employers' Liability Act. In that case only circumstantial evidence was produced. The same Justice wrote the opinion in both of these decisions. In the first case cited, as to the effect of circumstantial evidence in a negligence case, he said:

> "A case is usually made out by the positive testimony of eyewitnesses, to a transaction, who swear they saw the occurrence, and describe how it occurred. In this case we have no positive testimony as to how it occurred

as no witnesses saw how it happened, and we must resort to the evidence of circumstances to arrive at a conclusion as to how it occurred, and say whether or not there was sufficient evidence in the case for his Honor to submit the question to the jury, as to whether or not deceased was killed negligently, by the defendant, in any of the particulars alleged and specified in the complaint."

In the Mulligan case the Supreme Court said:

"It is not essential that in establishing liability and proving negligence that there must be eyewitnesses to the transactions to establish the fact or be direct, but the evidence can be either direct or circumstantial. The plaintiff assumed the burden of furnishing evidence, but the proof may be either direct or circumstantial."

The decision later quoted from the Thornton case as to circumstantial evidence is as follows:

"It has been held in the case of *Thornton v. Railway*, 98, S. C., 349, 82 S. E., 433, and authorities therein cited:

"'In an action for negligent injuries or wrongful death, plaintiff's failure to prove one of the several acts of negligence alleged does not warrant a direction of a verdict for the defendant. Where the servant of a railroad was run down in the yards, but there were no eyewitnesses to his death, it will not be presumed that he intended to commit suicide, and threw himself under the cars, but it will be presumed that he was attempting to carry out his duties with due care. While negligence cannot be presumed, but must be proved, it may be established by circumstantial evidence. If there is no competent evidence to go to the jury, a nonsuit should be granted."

The United States Supreme Court affirmed the judgment in the Mulligan case, supra, in a memoranda opinion reported in 242 U. S., 620; 61 L. Ed., 522; 37 Sup. Ct. Rep., 241.

ISSUE OF FACT ONLY

We quote from petitioner's Brief before the Supreme Court of South Carolina at page 18 as follows:

> "While the exceptions are four in number, they raise practically the same question; which is that the testimony fails to show that the engineer, in shooting the fireman, was acting within the scope of his agency and in furtherance of the defendant's business, and that the jury to so conclude must rely solely upon conjecture.
>
> "It will be noted that all the cases cited are in harmony as to the law. It is only in the application of the law to the facts that they vary."

Five times petitioner has appealed to State tribunals to agree with it and its counsel that the testimony at the trial "fails to show" that the engineer in shooting the fireman was acting within the scope of his agency.

The first appeal was made on September 22, 1943, to Honorable E. C. Dennis, one of the senior South Carolina Circuit Judges. Judge Dennis took the oath of office as Circuit Judge on January 17, 1923, (See statistical page, frontispiece, Vol. 123, S. C. Law Reports (N. S.).

Upon the conclusion of all of the evidence, counsel for the petitioner asked this able and experienced Judge for a directed verdict in its favor—(Record, Folios 115-118, pages 31 and 32). Judge Dennis in a succinct order from the bench, refused the motion—(Record, Folio 119, Page 32).

Petitioner's second appeal was made by its counsel to a jury of twelve citizens of South Carolina, who, under the Constitution and laws of the State, were the sole triers of the facts. This Court can read between the lines that counsel made an able argument to the jury, to the effect that the engineer and fireman had engaged in a private fight for personal reasons and that the engineer was not acting within

the scope of his agency at the time and, therefore, that the company was not liable.

Judge Dennis charged the jury clearly and completely as to the law. Able counsel for the petitioner have not in the slightest manner questioned the correctness of any phase of the instructions given by the trial Judge to the jury. More than once he instructed the jury that the main basis of the action was that the engineer was acting within the scope of his authority and that if he was not the company could not be held liable.

Judge Dennis further charged the jury that if it was a mere personal fight, or private fight, between the two men for personal reasons, the petitioner would not be liable.—(R. Folio 152; Page 40).

Contributory negligence on the part of a deceased employee under the Federal Employers' Liability Act only reduces the damages and is not a defense; yet, Judge Dennis charged the jury in connection with the now discarded defense of self-defense as follows:

> "I charge you that if the defendant has established either or both of these allegations by the greater weight of the evidence, that would be sufficient to make out the plea of contributory negligence, and I charge you further that if you find that the deceased did those acts, then the plaintiff cannot recover at all and your verdict should be for the defendant."—(R. Folio 167; Page 44).

The jury, which by its verdict eliminating the cause of action for pain and suffering, showed that it was a jury of intelligence and discretion, rejected petitioner's appeal and found as a matter of fact that there was negligence on the part of the engineer and that at the time of his wrongful act he was engaged in the discharge of his duties as engineer and was acting within the scope of his agency.

Just here permit us to say that counsel for petitioner argued self-defense with great zeal to the jury and continued to

do so before the State Supreme Court—(Appellant's brief in State Supreme Court, pages 19 and 22), but now this defense seems to be entirely abandoned by the combined counsel for the railway company—(Petitioner's brief and petition, page 9).

The third attempt to get State tribunals to agree with petitioner was made in an elaborate motion for a new trial before Judge Dennis, heard on October 21, 1943, a month after the jury's verdict. Counsel had ample time to think of everything possible upon which to base the motion but based it (other than a weak charge that the verdict was excessive) solely upon the ground that the evidence was not sufficient to substantiate the allegations of the complaint that the engineer at the time he shot and killed the plaintiff's deceased was engaged in his duties as engineer and within the scope of his agency—(Record, Folio 174, Page 46).

Again Judge Dennis heard full argument by counsel and "duly considered the matter." (Record, Folio 175, page 46). As to this ground of the motion, he held:

> "The Court is of the opinion that there was evidence to go to the jury upon the question of negligence and upon the question as to whether or not the engineer at the time he shot and killed the deceased was engaged in his duties as engineer and acting within the scope of his agency.
>
> "In my general charge, I charged the jury as to the law along this line. The stenographer's transcript shows the following special request by Mr. Bonham, attorney for the railway company:
>
> " 'By Mr. Bonham: In charging the jury, your Honor, you used the expression: 'Was the engineer at the time engaged in the discharge of his duties as engineer.' I think that under the law it would require more than that. Not only that Mr. Black was engaged in the performance of his duty, but that he was engaged in carrying out his work which was assigned to him.

"'The Court: That is correct. Not only must he have been engaged in the performance of his duty as engineer, but engaged in work assigned to him in the scope of his agency as engineer, and in the performance of his duty in the actual scope of his agency as engineer in enforcing his orders with reference to the duties required of the fireman.'

"I think that there was evidence to go to the jury upon these issues and cannot sustain the motion upon this ground."

The fourth appeal to the State Courts was made to the Supreme Court of South Carolina. Counsel submitted an elaborate 26 page printed brief and made an able oral argument to the Court.

The Supreme Court refused to reverse the lower Court and overruled petitioner's contention that it was not a jury issue.

It seems to us that the unanimous opinion of the State Supreme Court written by Chief Justice Baker and concurred in by Justices Fishburne, Stukes and Oxner, is clear and complete and showed that they had considered all points raised by the petitioner.

Nevertheless, counsel for the railway company filed a petition for a rehearing, its fifth appeal to the State Courts.

Under the South Carolina practice, a petition for rehearing is not served upon the attorneys for a respondent and the first we knew of the petition in this case was when we were served with a copy of the printed Transcript of Record herein.

A mere glance at this petition (Record, pages 62-64), shows that counsel again argued the facts of the case to the State Supreme Court.

Here counsel seemed to get a little consolation from the dicta language of Judge Baker in overruling the petition for rehearing. Under the South Carolina practice the petition for rehearing first goes to the Justice writing the opinion. As

Judge Baker wrote the opinion the petition for rehearing, naturally, went to him and he evidently thought that the other members of the Court would concur with him in his dicta, but the other three Justices were entirely satisfied with the able opinion which they had signed, and refused to approve Judge Baker's language and said: "We concur in the result of the foregoing order; *we think the case was correctly decided and, therefore, that the petition for rehearing should be denied.*" (Record, page 65)—(Italics ours).

THE CASE OF TENNANT vs. PEORIA & PEKIN UNION RY. COMPANY

It seems to us that this is a proper place in our brief to discuss the case of *Mary Tennant, Administratrix, vs. Peoria and Pekin Union Ry. Company,* 321 U. S., 29; 88 L. Ed., 322. Counsel for petitioner at page 18 of their brief contend that the Court below was "controlled in its decision in this case by a misinterpretation of the scope and effect of this Court's opinion in the Tennant case." This position is utterly untenable and indicates how, in their desperation, counsel will literally grasp at a straw.

There is not the slightest intimation in the record that the South Carolina Supreme Court misinterpreted this recent decision. Judge Baker's dicta language in the Order overruling the petition for rehearing, cannot be construed into such an intimation.

The legal history of the reference to this case by the State Supreme Court is most interesting.

The Tenant case was argued before this Court on December 15, 1943, and decided January 17, 1944. It was not referred to in the main brief of petitioner before the State Supreme Court.

In respondent's brief we relied almost entirely upon decisions of this Court. We had prepared a brief for use during the trial and merely enlarged upon it in the Supreme

Court. We made no reference to the numerous United States District Court and Circuit Court of Appeals decisions which may have had some minor bearing upon the law involved.

The State appeal was argued on March 14, 1944. On March 9, 1944, petitioner had filed a Reply Brief in which the Tenant case was mentioned for the first time. (See pages 5 and 6 of petitioner's Reply Brief in the South Carolina Supreme Court). It was referred to only as a decision of the Seventh Circuit Court of Appeals, 134 Fed. (2d), page 860.

The attorneys for the Southern Railway quoted at length from this decision, using almost two printed pages of their Brief to bring it prominently before the Court. Counsel referred to it in the oral argument and urged the South Carolina Court to adopt the language of that Court to the effect that the Administratrix of the deceased could not recover if there were several different inferences and theories shown by the testimony. After quoting from the opinion, counsel on page 6 of the Reply Brief, concluded:

> "We submit that the instant case is susceptible to various inferences and theories for most of which the employer is not liable. It is possible to assume, if one ignores the lack of evidence, that the engineer shot the fireman to enforce an order about the use of the water injector. There is certainly some testimony to show that the engineer acted in self-defense. It may be, as the respondent urges, that the fireman was using the coal scoop and the engineer got down from his seat and shot the fireman out of pure vindictiveness. It is conceivable that because of the ill feeling between the two men, which arose out of the first quarrel, another dispute arose which ended in the fatal encounter. So far as the evidence reveals the fight may have come about because of something in no way connected with anything which had gone before."

Several days after the argument in the State Supreme Court, counsel discovered that they had relied upon a case which had been completely reversed by this Court and on March 23, 1944, addressed a letter to all of the Justices participating in the hearing. We replied to this letter. (The letters of counsel are a part of the briefs in the case).

The first paragraph of their letter is as follows:

> "In fairness to the Court and to ourselves and to opposing counsel in the above stated matter, we feel it our duty to call the Court's attention to the fact that a case cited in our reply brief had been reversed by the United States Supreme Court at the time that the case was cited. We feel sure that the Court will know that we cited the case in good faith and that we did not know at the time that we quoted it, as authority, that it had been reversed. "The case cited is Tennant v. Peoria & Pekin Ry. Co., 134 Fed. (2d), 860."

Then follows an attempt to explain away the effect of the opinion of this Court and to minimize its force and effect. Counsel then said:

> "While it might be assumed that, by citing the Tennant case, we suggest that there are inferences to which the testimony is susceptible which would support the theory of liability, it will be noted by reference to the inferences to which we suggest the testimony is susceptible that none really sustains a basis of liability. We think we have suggested all the inferences to which the testimony is susceptible and that none of them so far as we can see is a basis of liability. If you will refer to our reply brief, you will see that on page 6 and 7 we suggest five possible inferences to which the testimony is susceptible:
>
> (1) It is possible to assume, if one ignores the lack of evidence, that the engineer shot the fireman to enforce an order about the use of the water injector.
>
> (2) There is certainly some testimony to show that the

engineer acted in self-defense.

(3) It may be, as the respondent urges, that the fireman was using the coal scoop and the engineer got down from his seat and shot the fireman out of pure vindictiveness.

(4) It is conceivable that because of the ill feeling between the two men, which arose out of the first quarrel, another dispute arose which ended in the fatal encounter.

(5) So far as the evidence reveals the fight may have come about because of something in no way connected with anything which had gone before.

"As we argued in our main brief and in our oral argument to the Court, none of these theories can be the basis of liability. Only in the circumstances of the first suggested inference could liability arise, but, as you will note, for such an inference to arise one must ignore the lack of evidence and rely entirely upon conjecture.

"The Tennant case has no application to the instant case except insofar as it holds that speculation will not be allowed to do duty for probative facts, for the reason that in the Tennant case there was no question but that there was proof of actual negligence and the real question was whether or not such negligence was the proximate cause of the injury. There was proof in the Tennant case that the engineer had failed to ring the bell as required by the rules of the company, which rules were for the protection and benefit of trainmen engaged as was the plaintiff's intestate and there was further proof that the plaintiff's intestate had been killed at a place where he should have been in the performance of his duties. While the testimony might have been susceptible to other inferences and theories, the Supreme Court felt that the jury should be left to decide whether or not the established negligence was the proximate cause of the injury. The position we have intended to take and feel that we have taken all the way through is that in the instant case there was no evidence of negligence and that

such a conclusion can be reached only by conjecture.
"While writing this it has occurred to us that it might be well for the Court to look at the case of *Williamson vs. Southern Railway Co.*, 183 S. C., 312, where on page 324 it is said: 'Verdicts cannot be allowed to rest upon mere surmise, conjecture, or caprice.'"

Now counsel assert that the Tennant case is all important because the South Carolina Court "misinterpreted" the opinion of this Court.

AMPLE EVIDENCE OF NEGLIGENCE IN CASE AT BAR

Counsel for the petitioner seek to distinguish the Tennant case and this case by saying that in the former there was "proof of actual negligence," but in the instant case there "was no evidence of negligence."

Unless the defense of self-defense on the part of the engineer is accepted, the evidence of negligence is overwhelming.

In view of the language of the State Supreme Court as to the defense of self-defense, this issue should be completely discarded. The Supreme Court said:

> "We can disregard the statement of the engineer, Black, made to the conductor, Short, immediately following the shooting of the fireman, Jester, that he had to do it, that he (Jester) was after him with a hammer, because the circumstantial evidence in the case as to the hammer, being in the same place after the difficulty as before, would have made an issue for the jury to decide whether Black, at the time of shooting Jester, was acting in self-defense."

It follows as an inevitable conclusion that if the engineer did not shoot in self-defense, then his act was negligence under the Federal Employers' Liability Act.

The only issue, therefore, is whether the wrongful act of the engineer was perpetuated while he was in the discharge of his duties and acting within the scope of his agency.

The Federal Employers' Liability Act not only makes the carrier liable for its negligence but also for that of its "*officers, agents or employees.*"

Engineer Black's negligence or wrongful act is overwhelmingly established by the evidence.

The evidence, both direct and circumstantial, that the engineer was acting as engineer at the time of the wrongful act and within the scope of his agency is almost as strong and complete. In any event, the evidence was sufficient to raise a jury issue as to whether or not he was acting within the scope of his authority or that it was a "mere private fight between the two men for personal reasons."

Just here, it is significant that in the charge of Judge Dennis to the jury he used almost the identical words used by the trial Judge in the Encarnacion case, infra, and which were approved by this Court.

We quote from the opinion of this Court in the Encarnacion case as follows:

> "The trial judge instructed the jury that the defendant would not be liable if the foreman assaulted plaintiff by reason of a personal difference, but that, if the foreman in the course of his employment committeed an unprovoked assault upon plaintiff in furtherance of defendant's work plaintiff might recover."

Judge Dennis' charge along this line will be found in the record, Folio 151, page 40.

Throughout this case we have based our right of recovery upon the Encarnacion and Cain cases, infra, which are set forth fully in the last part of this brief.

It will be recalled that in the Encarnacion case the plaintiff recovered a verdict in the trial Court, which was reversed by

the Supreme Court of New York. That Court took exactly the same view that the petitioner does here, namely that the employer was not liable for the assault and battery of its agent even though he was acting within the scope of his agency.

The New York Court of Appeals, however, reversed the Supreme Court and upheld the judgment based upon the verdict of the jury. As elsewhere stated in this brief, the late Justice Cardozo was then a member of the New York Court of Appeals and participated in its opinion. In its opinion, the New York Court of Appeals said:

> "'Defendants' testator was an employing stevedore. Plaintiff was one of his employees who was assaulted by the foreman or gang boss in charge of a gang engaged in loading a barge in the East River. The evidence justifies the inference that the foreman, in an effort to carry out his orders to keep the men busy and in furtherance of the employer's work, assaulted plaintiff, an employee subject to his orders, to make him hurry up with the work in which he was engaged. No question of negligence is in the case. The trial judge allowed a recovery, if the jury found that 'the assault was committed in the furtherance of the master's work.' *Mott v. Consumers' Ice Co.* 73 N. Y., 543, 547. The jury so found. The Appellate Division reversed, applying the fellow servant rule, and holding that there was no liability on the part of the employer, even though the foreman inflicted the injuries when he was engaged in hurrying up the work in obedience to the employers' orders."

CORRECT INTERPRETATION OF TENNANT CASE

As to the effect of the Tennant case, we respectfully submit that it is clear that the State Supreme Court referred to this opinion because of the importance attached by petition to the decision of the Circuit Court of Appeals therein. We respectfully submit that the opinion of this Court in the Ten-

nant case simply follows a long line of decisions of this Court decided under the Federal Employers' Liability Act.

This Court did reverse the Circuit Court of Appeals of the Seventh Circuit as to its erroneous holdings as to the effect of "conflicting inferences and conclusions." There is absolutely nothing in your opinion *"narrowing the rule as to the granting of non-suits and direction of verdict."*—(Italics ours.)

A mere glance at the wording of the opinion in the Tennant case will show that we are correct in this conclusion.

UNDER FEDERAL EMPLOYERS' LIABILITY ACT WILFUL ACTS ARE INCLUDED IN THE TERM OF "NEGLIGENCE"

Throughout this case, until the present time, counsel for petitioner have conceded that if the engineer was acting within the scope of his agency that there was no difference between a wilful act and a negligent act.

Judge Dennis so charged the jury (Record, Folio 146, page 39), and no exception of the slightest nature has been taken of the correctness of the charge.

In their brief to the State Supreme Court, at page 7, the Attorneys for petitioner said:

> "The law applicable to this case is simple. Succinctly stated it is that an employer is not liable for the wrongful attack by one employee upon another, unless the assailant is acting within the scope of his employment, while in the discharge of a duty owing the employer, and the assault is made in furtherance of the employer's business. If the assault is made for purely personal reasons, the employer is not liable."

In their brief here counsel for the petitioner spend much time in making distinctions between "simple assaults" and "murderous assaults." They speak about "non-murderous

assaults" and "wilful assaults." They characterize the assaults and batteries in the Encarnacion and Cain cases as "simple non-murderous, though wilful assaults." They draw a distinction between "injury" from an assault and a "death" due to "intentional, malicious homicide or murder"—(Page 10, Petition and Brief).

In the first place the Act does not distinguish between liability for "injury" and "death." The Federal Liability Act sets up the same standards of liability and right of action regardless of whether it be a case of "injury" resulting, for example, in the loss of a leg or arm, or a case of "death" resulting in the loss of the sole and only support of a young widow and two small children, as in the case at bar.

The law of South Carolina makes no distinction in defining murder and assault and battery with intention to kill, or as between assault and battery of a high and aggravated nature and manslaughter, except that in one type of case the assaulted party lives and in the other he dies.

In the case of *State v. Jones*, 130 S. E., 747; 133 S. C., 167, the Court said:

> "While there is no statutory definition of the offense of 'assault and battery' in this state, common usage for convenience has divided the offense into three degrees: (1) Assault and battery with intent to kill and murder; (2) assault and battery of a high and aggravated nature; (3) simple assault and battery. The division is intended more for the purpose of imposing sentence than of establishing distinct crimes or degrees of a crime. For the sake of brevity these divisions will be referred to as of the first, second, and third degrees.
>
> "The first degree contains all of the elements of murder except the actual death of the person assaulted; so that before the accused can be convicted of this charge, the jury must be satisfied beyond a reasonable doubt, from the evidence, that if the party assaulted had died as a result of the injury, the defendant would have been

guilty of 'murder', which is defined in section 1 of the Criminal Code, as 'the killing of any person with malice aforethought, either express or implied.' It is apparent that there must be, not simply the intent to kill, for that may be present in a case of manslaughter, but the intent to kill accompanied with malice, the distinguishing element between murder and manslaughter. "It has been a common practice for circuit judges, in their charges to juries, to assimilate the law in cases of first degree assault and battery to the law applicable to murder (which is entirely right), and to assimilate the law in cases of second degree assault and battery, to the law applicable to manslaughter."

The general rule in the United States is thus summarized in C. J. S., Vol. 40, page 945, as follows:

> "To constitute an assault with intent to murder, the act must have been done under such circumstances that, if death resulted, the homicide would have been murder, and according to the weight of authority it is immaterial whether it would have been murder in the first or second degree."
>
> "Except as otherwise provided by statute, an assault with intent to kill or commit manslaughter consists of an intent to kill and an overt act toward its commission, under circumstances which would have made the act manslaughter if death had ensued."

We are utterly unable to see the logic of a contention that the Act would cover a deadly assault and battery with a monkey wrench as in the case of Alpha S. S. Corporation vs. Cain, infra, and exclude the Jester case where death resulted from a deadly assault and battery with a pistol. According to their contention, had young Jester survived the shots after months of pain and suffering he could have recovered for his injuries under the rule announced in the Encarnacion and Cain cases, but that having died from the shots his widow and two little children would be barred from recovery.

This distinction is almost absurd, in our humble opinion, when the Act itself gives exactly the same right to the beneficiaries of a deceased to recover as it does to an employee to recover for his own injuries.

How counsel are able to classify a deadly assault and battery with a monkey wrench in which the ship officer struck the seaman two heavy blows across the head and over the eye, (35 *Fed.* (2d) 719), *resulting, as characterized by this Court "as seriously injuring him"* (281 *U. S.*, 643), *and justifying a verdict of $12,000 damages, which both the District Judge and the Circuit Court of Appeals refused to reduce as excessive,* (*35 Fed. (2d), page 723*), *as a "simple non-murderous assault," is beyond our power of comprehension.*

Counsel likewise attempt to distinguish the Encarnacion and Cain cases from this case by contending that in those cases the wilful acts were committed on seaman on shipboard and that a different rule applies to "conditions at sea." (Pages 10 and 11, Petition and Brief).

Surely, the attorneys for the petitioner are familiar with the language of the Merchant Marine Act, Section 688, Title 46, USCA, which gives to seamen the same rights that are given to employees of railway carriers and no more. That Act says:

> "Recovery for injury to or death of seaman. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be

applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, c. 153, Section 20, 38 Stat. 1185; June 5, 1920, c. 250, Section 33, 41 Stat. 1007."

We have so far been unable to discover any language in either the above quoted Act or in the Federal Employers' Liability Act making any distinction between the rights of seamen and railway employees in actions for injury or death.

We do not see how it is possible for a Court to speak in clearer and plainer language than this Court used in the Encarnacion and Cain cases. Beyond any possible question, the Court in those cases was construing the meaning of the word *"negligence"* as used in the Federal Employers' Liability Act. In its opinion in the Encarnacion case, the Supreme Court quoted the exact language of the Merchant Marine Act and then quoted Section 1 of the Federal Employers' Liability Act.

As to the plaintiff's right to recover, the Court said:

"He is entitled to recover if, within the meaning of Section 1, his injuries resulted from the negligence of the foreman.

" 'The question is whether 'negligence,' as there used includes the assault in question." x x x x x x "The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purpose for which it was enacted and to that end the word may be read to include all the meanings given to it by courts and within the word as ordinarily used."

In the Cain case the Supreme Court said:

" 'That court expressed the opinion (35 F. (2d) 717, 721) that Section 33 of the Merchant Marine Act, U. S. C. title 46, Section 688, and the Federal Employers' Liability Act, U. S. C. title 45, Sections 51-59, did not apply, and held defendants liable under the general maritime

law without regard to these acts. But in *Jamison v. Encarnacion*, decided this day (281 U. S., 635, ante, 1082, 50 Sup. Ct. Rep. 440) we hold that such an assault is negligence within the meaning of Section 1 of the Federal Employers' Liability Act, which is made available to seamen by Section 33 of the Merchant Marine Act. The ruling in that case controls in this."

The concluding paragraph of the Court's opinion in the Encarnacion case is most significant. It is as follows:

> *"While the assault of which plaintiff complains was in excess of the authority conferred by the employer upon the foreman, it was committed in the course of the discharge of his duties and in furtherance of the work of the employer's business. As unquestionably the employer would be liable if plaintiff's injuries had been caused by mere inadvertence or carelessness on the part of the offending foreman, it would be unreasonable and in conflict with the purpose of Congress to hold that the assault a much graver breach of duty, was not negligence within the meaning of the act. Johnson v. Southern P. Co., supra; Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S., 1, 9, 10, 51 L. Ed, 681, 685, 27 Sup. Ct. Rep. 407.'"*—
> (Italics ours.)

UNTENABLE POSITIONS OF PETITIONER

We will devote a part of this brief in answering some of petitioner's untenable and unreasonable positions.

At page 11 of the Petition and Brief, petitioner says:

> "The murderous assault by shooting twice with a pistol, in our case, could not have been made with any purpose to hurry Jester with his work or to compel him to work. Its only purpose and only possible effect were to impose capital punishment upon him and completely to stop him from work, to put an end entirely to the furtherance of the master's business until Jester's remains

could be disposed of, Black could be arrested, and a new engine crew provided. This result was inescapable from the very nature of Black's act, and no other could have been anticipated."

The results of a negligent or wrongful act by an employee are never satisfactory to an employer. In the thousands of tort cases reported in the law reports of this Country, the results of the wrongful act of the servant or agent have always been more or less disastrous to the master or employer. Viewed by subsequent mediation, no tort by an employee could ever be said to have been performed in "furtherance of the master's business."

We quote the following from our brief in the State Supreme Court:

"Just here let us point out that all such expressions as 'furtherance of the employer's business,' 'course of employment,' etc., are merely equivalent expressions of the phrase 'scope of employment or agency' and in no way change the meaning of that all important legal phrase. 39, C. J., 1282.

"The general error committed by most attorneys in dealing with this term 'scope of agency or employment,' is in attempting to isolate the culminating act resulting in the wrong and to contend that this act was without the scope of the agency. In other words, they seek to perform a surgical operation in law by severing from the assigned duty the act resulting in the injury and treat the two as entirely separate things. They then contend that the amputated act is without the scope of the agency. If this were permitted no employer would ever be held responsible for the wrongful act of his agent. We have never read or studied of a case where the employer came into Court and admitted that he had authorized his agent or servant to commit a homicide, or an assault and battery, or a slander, or any other unlawful or careless act by which another person was injured or killed.

> "The true test is whether or not the wrongful act grew out of the employment or was an act perpetrated by the servant in his own behalf or interest."

On page 15 of their present brief, petitioner's counsel seek to weaken the effect of the Encarnacion case by citing decisions in which an attempt is made to distinguish that case.

The Encarnacion opinion is a masterful decision of this Court. It was pronounced in May, 1930, and its clear and positive language has never been modified, changed or added to by this Court in fourteen years.

Both here and in the State Court, petitioner placed great faith and reliance in the opinion of the case of *Lykes Bros. S. S. Co. v. Grubaugh*, 128 Fed. (2d), page 387. A study of this decision demonstrates again the recklessness with which petitioner's attorneys cite cases as authority. This was an action by a ship steward against the owner for damages for an assault and battery committed upon him by the chief and assistant engineers. The main issue in that case was whether or not the engineers had any authority over the steward. The men were in separate departments and were not then engaged in any common business for the employer.

The opinion of the Circuit Court of Appeals, reversing a judgment of the District Court in plaintiff's favor, indicated a clear approval of the Encarnacion and Cain cases and pointed out that in those cases it was an assault by superior officers upon subordinate employees "whom the assailant had the power and authority to direct," etc. What makes this decision burst like a bubble in the petitioner's face is the concluding paragraph, as follows:

> "Though we believe that no case was made out and that the judgment must be reversed, we are not of the opinion that it ought to be reversed with directions to enter judgment. We think rather that the judgment should be reversed and the cause remanded for trial anew, this time upon depositions and full testimony upon the issues of fact and of law as to the authority, if any, the engineer

had over plaintiff, and whether he was, at the time of the fight, undertaking to exercise it in carrying out his master's business."

The record shows too that Circuit Judge McCord wrote a strong dissenting opinion in the Lykes case, saying that the issues "were properly submitted to the jury," and relied entirely upon the Encarnacion and Cain cases.

CONJECTURE vs. INFERENCE

Throughout this case petitioner because it believed that only Engineer Black knew exactly what was said in the final act culminating in the shooting that only by "conjecture" could the widow of the deceased show that the engineer was was acting within the scope of his agency. It is true that a verdict cannot rest upon "conjecture" but it is always upheld upon proper "inference" drawn from facts established either by direct or circumstantial evidence.

We again extract the following authority from our State Court brief:

> "There is a vast difference between 'conjecture' and 'inference." In Vol. 15 C. J. S., page 972, we find the following definition of conjecture:
>
> "An idea or motion founded on a probability without any demonstration of its truth, an idea or surmise inducing a slight degree of belief, founded upon some possible, or, perhaps, probable fact, of which there is no positive evidence, supposition or surmise, or the lowest degree of presumption.
>
> "The term may be employed as synonymous with 'guess' and 'guess-work' but has been distinguished from 'inference,' 'necessary implication,' and 'speculation.'
>
> "On the contrary, an inference is a conclusion drawn from an established fact, or growing out of an established fact.

"In 31 C. J., page 1181, we find the following definitions given as to the meaning of the word 'inference.':

"A conclusion drawn by reason from premises established by proof; a conclusion in favor of the existing one from others proved; a conclusion which, by means of data founded upon common experience, natural reasons fraws from facts which are proved: a deduction from facts proved; a deduction or conclusion from facts or propositions known to be true, a deduction which the trier may or may not make according to his own conclusions; a permissible deduction from the evidence; something inferred from precedent matter, separated from which it is a mere absurdity of language."

RESPONDENT'S PRINCIPAL AUTHORITIES

We prepared a trial brief before Judge Dennis in the lower Court. In this brief we pointed out that five decisions of this Court were the only ones directly affecting the law involved.

We reprinted our analysis of these five cases in our printed brief before the Supreme Court. These five decisions, in chronological order, are:

James C. Davis, Director General of Railroads, etc., vs. Mrs. Maude E. Green, Administratrix of the estate of Jesse Green, deceased. 260 U. S., 349; 67 L. Ed, 299; 43 S. Ct. 123.

Atlantic Coast Line Ry Co., vs. Ida Mae Southwell, Admx. of H. J. Southwell. 275 U. S., 641; 48 S. Ct. 25 72 L. Ed. 257.

Inez M. Jamison et al., vs. Valentine Encarnacion, 281 U. S., 635; 50 S. Ct. 440; 74 L. Ed., 1082.

Alpha Steamship Corp., et al., vs. Robert Cain, 281 U. S., 642; 50 St. 443; 74 L. Ed. 1086.

Nelson v. American-West African Line, 86 Fed. (2d),

page 730. Certiorari denied—300 U. S., 665; 81 L. Ed. 873.

We will reproduce the same analysis of the first four cases as an appendix of this brief.

We feel that these cases are of so much importance that it will be helpful to the Court to have them where they are handy of use in studying the case.

THE CASE OF NELSON V. AMERICAN WEST AFRICAN LINE

We think the above entitled case is sufficient to justify the Court in denying the Writ of Certiorari, thereby refusing to give the petitioner a sixth hearing on its contention that there was no evidence to go to the jury that at the time of the fatal act Engineer Black was acting within the scope of his agency as engineer.

This Court refused certiorari in the Nelson case, supra, and we respectfully submit that the facts here are much stronger than in that case.

In its memoranda opinion filed on March 1, 1937, this Court does not assign any reason or authority for its decision to deny the Writ of Certiorari, but we are convinced that it was upon authority of the Encarnacion and Cain cases, supra. We submit the following analysis of the Nelson case:

John A. Nelson was an able seaman upon the steamer "West Irmo." While the ship was lying in a port on the Congo River near midnight, the ship's boatswain made a murderous assault upon the plaintiff. The Circuit Court of Appeals of the Second Circuit gave this statement of the facts:

> " 'The theory of the action was that the boatswain was acting within the scope of his authority, and that the satute created a cause of action against the owner under the doctrine of *Jamison v. Encarnacion*, 281 U. S., 635, 50 S. Ct. 440, 74 L. Ed, 1082; and *Alpha S. S. Corp'n. vs.*

Cain, 281, U. S., 642, 50 S. Ct. 443, 74 L. Ed., 1086. In the light of those decisions no issue remains except whether the boatswain was so acting, as to which the evidence is as follows: 'The 'West Irmo' had but one boatswain; he had been off duty ashore, where he got roaring drunk, and came aboard at night with much noise, disorder and violence. He first chased the carpenter into the lavatory, and tried to break through the door to get at him; he then went back into the mess room, where he furiously raged about for a while, until the notion seized him to go into the crew's quarters, where the plaintiff was trying to sleep. It was still a half hour before midnight when the plaintiff was to go on watch, but the boatswain apparently had a mad idea that the plaintiff should get up and go on deck at once, for as he struck him, he cried out to him, 'Get up, you big son of a bitch, and turn to.' Having roused him by the first blow, he engaged in a fight with him in which the plaintiff was further injured. The boatswain kept no watches, but worked as occasion required; he had authority to call out all hands when he thought best and did so, for example, on leaving port, or in stress of weather. Like other boatswains, he was foreman, so to say, of the crew. The judge thought that at the time of the assault he was not acting for the ship and dismissed the complaint.' "

In dealing with the law of the case, the Court said:

" 'When the case of *Alpha S. S. Corp. v. Cain, supra*, was before us, *Cain v. Alpha S. S. Co.*, 35 F. (2d) 717, we discussed the question now at bar. The circumstances were indeed different because the superior officer was on duty at the time, but the plaintiff did not, and could not, assert that the assault in fact was in aid or discipline on board the ship, or that it was not in part acuated by motives which had nothing to do with the owner's interest. A principal is not chargeable with wilful acts, intended by the agent only to further his own interest, not done for the principal at all. *Davis v. Green*, 260

U. S., 349, 43 S. Ct. 123, 67 L. Ed., 299; *Bonsalem vs. Byron, S. S. Co.*, 50 F. (2) 114 (C. C. A. 2); *Sibley vs. Barber S. S. Lines* (D. C.), 57 F (2d), 318. Restatement of agency, Section 235. But motives may be mixed, men may vent their spleen upon others and yet mean to further their master's business; that meaning, that intention is the test. *Pennsylvania Mining Co. v. Jarnigan*, 222 F. 889 (C. C. A. 8); *Whitted v. Southwestern T. and T. Co.*, 231 F. 926, (C. C. A. 8); *Schultz v. Brown*, 256 F. 187, 191 (C. C. A. 9); *Thompson-Starrett Co. v. Heinold*, 60 F. (2d), 360 (C. C. A. 3); *Mott v. Consumers' Ice Co.*, 73 N. Y. 543, 551; *Magar v. Hammond*, 183, N. Y. 387, 390, 391, 76 N. E., 474, L. R. A. (N. S.) 1038; Restatement of Agency, Section 236, Section 245, comment (d). In the case at bar the boatswain may indeed have had no other purpose than to do violence to anyone who fell in his way; unless there was some evidence that he supposed himself engaged upon the ship's business, the ship was not liable. In support of the conclusion that he did not so suppose, the ship argues that there was no occasion for him to intervene at all; that the plaintiff had nothing to do till he went on watch which was half an hour off; and that there was every reason to suppose that he would do his duty when his turn came. In truth, it was at best an act of wanton tyranny to get him out of his bunk at that time, to say nothing of the violence used in effecting it. But the boatswain was blind drunk and through his clouded mind all sorts of vague ideas may have been passing; the fact that he had made himself incompetent to further the ship's business was immaterial, the owner had selected him to command, whatever his defects and his addictions. If he really meant to rouse the plaintiff and send him upon duty, if he really meant to act as boatswain and for the ship, however imbecile his conduct it was his master's. We are disposed to think that when he told him not only to get up, but to 'turn to,' that order was some evidence that he meant to act for the ship, and not alone to satisfy his vindictive

passions. Normally when an officer, drunk or sober, tells a man to go to his duty, it is not for the mere show of authority, but at least in part because he supposes that some work should be done. The best that an owner can ask in such a case is that if the jury believes that the order, though in form in the ship's behalf, was given only in vainglory, he shall not be charged. The result does not depend upon the scope of the boatswain's authority in the ordinary sense; we have not to say whether an act, for example forbidden by the master, should nevertheless be imputed to him. There is here no doubt that if the boatswain intended to act for the ship at all, his command was within his powers; he had been authorized to order any seaman to any work at any time; the order was within not only his apparent authority—whatever that phrase may mean—but within his express authority. The inquiry into the tangled mazes of a drunken boatswain's mind may be beyond the powers of a jury, but it is the fact upon which the case turns, and there was enough to justify them in finding that he supposed that he was acting as boatswain and not wholly as a petty tyrant. It does not indeed follow that the subsequent affray was in the same class as the original blow, but that is a matter to be dealt with when the judge charges the Jury.' "

With this statement of facts and the law, as laid down by the Circuit Court of Appeals, this Court refused to interfere and denied certiorari.

Clearly this Court believed that it was a plain jury issue.

RECENT UNITED STATES SUPREME COURT DECISIONS

We think the recent cases of *Tiller v. At. Coast Line Ry. Co.* 318 U. S., page 54; 87 L. Ed., 610; 63 S. Ct. 444; and *Florence J. Bailey, as Administratrix, vs. Central-Vermont R. Co.*, 319 U. S. page 350; 87 L. Ed., 1444, 63 S. Ct. 1062; correctly state

the rule as to the direction of verdicts by a Court under the Federal Employers' Liability Act.

CONCLUSION

In conclusion we emphasize the language of the Circuit Court of Appeals for the Second Circuit in the Cain case, supra, to-wit:

> " 'The evidence made it a jury question whether he committed the assault as an officer of the ship, in an effort to maintain discipline and obtain a full engine room crew for the watch of which he was in charge, or struck the blow in a private brawl.' "

We have maintained throughout that in this case it was a question for the jury as to whether Engineer Black killed the deceased as a superior officer in an effort to enforce "his orders as engineer upon the deceased in the performance of his duties as fireman." (R. Folio 23, page 8), or fired the shots in a "private brawl" or personal difficulty totally disassociated with his duty as engineer.

This widow and two fatherless children have been patiently standing in the "Halls of Justice" since last June. Five times they have heard State tribunals reject petitioner's appeals to send them forth empty-handed.

We cannot believe that the highest Court in the land will say that the death of their sole support, literally at his post of duty, shall stand forever without recompense.

Respectfully submitted,

JAMES H. PRICE,

JAMES D. POAG,

Attorneys for the Respondent.

APPENDIX

As stated in the main Brief, we are reprinting our analysis of the four decisions of the United States Supreme Court, which we think touches upon all phases of the law of this case. We clearly show, in our humble judgment, that the first two cases, that of *Davis v. Green* and *A. C. L. v. Southwell*, have no application to the case at bar.

James C. Davis, Director General of Railroads, etc.
Petitioner.

vs.

Mrs. Maude E. Green, Admr. of the estate of Jesse Green, deceased.

260, U. S., 349; 67 L. Ed., 299, 43 S. Ct. 123. Decided December 4, 1922.

Case tried below in Circuit Court for Forest County, State of Mississippi.

Reported below in 125 Miss., 476; 878 So. 649.

The deceased, Jesse Green, was a conductor employed by Walker D. Hines, Director General of Railroads, in the railway yards at Hattiesburg, Mississippi. He was shot and killed by an engineer by the name of McLendon, also employed by the same defendant. The shooting occurred in said railway yards at Hattiesburg, Mississippi.

The deceased was conductor of a switching crew operating in the railway yards. The engineer was in charge of the engine which was engaged in moving certain cars from one point to another. In addition to the engineer and several other crew members, there was a negro switchman, who incurred the anger of Engineer McLendon by repeating a certain signal several times, after the latter had told him not to give any signal but once. The switchman, after repeating the particular signal on this occasion, mounted the running board of the locomotive. Apparently infuriated at the switchman for failing to do as he said, the engineer armed with a heavy hammer,

came down from his cab and berated the negro for disobeying him. The switchman replied that he was doing the best he could to follow out the instructions of Green, the deceased conductor, *who was foreman of the crew and over all of them.* McLendon, the engineer, replied *that he would kill both the switchman and the conductor.* He thereupon knocked the negro off the running board with the hammer. The switchman was so badly injured that he had to be sent to a hospital, which necessitated some of the train crew having to leave their jobs in order to carry him. McLendon, in a most cold-blooded and indifferent manner, started up the engine and ran it on the switch, which was to have been thrown by the injured negro. He knew, of course, that the negro could not perform this task. McLendon stopped the engine and the deceased proceeded from one of the cars in the rear of the engine to throw the switch himself, which it was his duty to do in the event of an emergency such as then faced the crew. McLendon came down from his cab with a pistol and went to the front of his engine and when Green came up he exclaimed, "Why in the hell have you not thrown the switch?" Almost immediately he fired two or three shots at the conductor and killed him on the spot. There was evidence of the bad reputation of the engineer for violence and further evidence of previous differences and ill will between the two men. Several months before this instance the deceased had applied for and obtained a transfer which separated him from the engine man whose bad reputation was known to the deceased. Knowing that he might again be assigned to a crew with McLendon, the deceased, a short time before his death, applied for another transfer from night work to day work, which was granted, and he was in fact assigned to work with the man who later shot and killed him. It appeared that several times Green had reported McLendon for failure to perform his duties as required by the rules of the railway company.

Upon the trial the widow recovered a verdict of $35,000, which was reduced by the State Supreme Court to $16,000, doing so upon the ground that the Federal Employers' Lia-

bility Act did not apply and that the State decisions controlled the question as to the amount of damage.

The Director General carried the case on appeal to the United States Supreme Court.

Among other things, the Supreme Court of Mississippi had held that the Federal Employers' Liability Act did not apply and that the entire case was controlled by the State law, basing its decision upon the ground that the cars being moved by switching crew at the time in question were not being used in interstate commerce.

The United States Supreme Court reversed the State Court, holding as follows:

> "The Supreme Court sustained the judgment, although it held that the case was governed by state law. It held that, on the general principle of liability, the act of Congress and the law of the state agreed. It held, however, that there were important differences between the two laws with regard to the measure of damages and otherwise, and that, as the case was tried under the act of Congress, and as, on the evidence, the highest tmount that could have been recovered under the Federal act was $16,000, the plaintiff must remit all above that amount if she would retain her judgment, although, under the state law, she could have recovered more.
>
> "The ground on which the railroad company was held was that it had negligently employed a dangerous man, with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present *the killing as done to further the master's business*, or as anything but a wanton and wilful act, doe to satisfy *the temper or spite of the engineer*. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green

which it was his duty to obey,—in other words, *that he did a wilful act wholly outside the scope of his employment* while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of respondent superior applies.

"As we understand the opinion of the Supreme Court of Mississippi, it based its decision in part upon the assumption that liability for the engineer's act was imposed upon the defendant by both laws; and this assumption would be a sufficient ground for reversing the judgment. But we should come to the same conclusion even if our understanding were shown to be wrong. As the record stands, it appears to us that the case was tried upon the warranted supposition that there was no serious controversy as to the parties having been engaged in interstate commerce, and for that reason the defendant paid but slight attention to proving the fact. It seems at least not improbable that the parties were so engaged. In such circumstances the defendant is not to be deprived of its rights under the law of the United States by a decision that the fact now questioned was not adequately proved. On such matters we must judge for ourselves. If there is a new trial, probably the plaintiff will be allowed to dispute the character of the employment, if she is so advised. See *Bowen v. Illinois*, C. R. Co. 70 L. R. A. 915, 69 C. C. A. 444, 136 Fed. 306, 18 Am. Neg. Rep. 289."—*(Italics ours)*.

Atlantic Coast Line Ry. Co.,
Petitioner.

vs.

Ida May Southwell, Admx., of H. J. Southwell.
275, U. S., 64; 72 L. Ed. 157; 48 S. Ct. 25.
Reversal of N. C. Supreme Court.
Decision below reported in 131 S. E. 670.
Case decided October 31, 1927.

Very few, if any, of the facts are given in the United Stat-

es Supreme Court report of this case. We present the following analysis of the evidence as found in the report of the opinion of the Supreme Court of North Carolina in 131 S. E. 670:

The plaintiff's intestate was employed by the defendant railway company as an engineer, running from Fayetteville, North Carolina, to Wilmington, North Carolina. One H. E. Dallas was employed by the defendant as assistant yard master at Wilmington. About ten days or two weeks before the plaintiff's intestate was shot and killed by Dallas, the latter was appointed a *special police officer* by the Mayor of Wilmington at the request of the company. There was a strike on at this time by the shop men of the railway company and the railway yards were picketed by the strikers. Dallas performed various services under E. L. Fonvielle, general yard master. The strike began on July 1, 1922, and between that time and the killing on July 18, 1922, the general yard master had seen Dallas carrying a pistol about the yards. It developed during the trial that Southwell had evinced an antagnostic attitude toward the strike breakers and apparently included Dallas in his enmity toward the non-union workers. The deceased had made one or two threatening remarks to Dallas and had attempted at one time to crush Dallas between two cars which Dallas was inspecting. For his conduct and threatening remarks, Southwell had been admonished by W. H. Newell, Superintendent of the company. He ordered Southwell to attend strictly to his own business and keep his mouth shut. On the occasion when Southwell tried to run over Dallas with his train some threatening remarks were made by Southwell. Unquestionably, there was bad blood between the two men of a very serious nature prior to the shooting.

On the day of the fatal act, Fonvielle saw Dallas with a pistol but as he was a special police officer thought nothing of it.

Southwell came in on his run, put up his engine and went to the engineer washroom and cleaned up, his duties for that time being at an end. On his way going home he met Dallas

out in the yards. As to the actual shooting little, if any, evidence was developed. It seems certain, nowever, that at the time Dallas was not on any company business. *He had no official duties to perform which required him to contact Southwell.* He had, a few minutes before the shooting, informed Fonvielle that he wanted to see Southwell and ask him to "lay off of me." *This appears to have been his only motive, if any, in contacting Southwell at the time.* Southwell had no duties to perform at the time, he having completed his run for the day and was going home. *The final quarrel and killing had no connection with any railroad busiess.* Dallas firing two or three shots and the engineer died as a result of his wounds.

Southwell's widow brought action against the company and recovered a verdict of $12,000, which was upheld by the State Supreme Court.

The United States Supreme Court reversed the State Court and said:

> "This is an action brought against the petitioner by the administratrix and widow of one of the petitioner's employees, for the death of her husband by a murder which it is alleged that the petitioner 'with gross negligence wilfully and wantonly caused, permitted and allowed.' In view of the decision in *Davis v. Green*, 260 U. S., 349, 67 L. Ed. 299, 43 Sup. Ct. Rep. 123, *the plaintiff did not attempt to hold the petitioner liable as principal in the act, but relied on its failure to prevent the death.* The Supreme Court of North Carolina upheld a judgment for the plaintiff. 191 N. C., 153, 131 S. E., 670. It is admitted that the action is based upon the Federal Employers' Liability Act for April 22, 1928, chap. 149, Section 2, 35 Stat. at L. 65, U. S. C. title 45, Section 52, and the question is whether there was any evidence that the death resulted in whole or in part from the negligence of any officer of the petitioning road, under the law as applied by this court. *New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367, 371, 62 L. Ed., 1167, 1170, 38 Sup. Ct. Rep. 535.

"It would be straining the language of the act somewhat to say in any case that a wilful homicide 'resulted' from the failure of some superior officer to foresee the danger and to prevent it. In this case at all events we are of opinion that there was no evidence that warrants such a judgment. It is not necessary to state the facts in detail. Those mainly relied upon are that Fonvielle, the general yard master knew that Southwell, the man who was killed, on previous occasions had used threatening language to Dallas, who shot Southwell; that Fonvielle knew or ought to have known that they were likely to meet when they did; that Fonvielle was with Dallas, his subordinate, just before that moment and that Dallas said to him, 'Cap., all I want to do is to ask Southwell to lay off of me and let me alone,' and that Fonvielle said that he must not see Southwell, that if he saw him and talked to him it might bring about unpleasant consequences; that Fonville left Dallas and after having gone a short distance saw him and Southwell approaching each other and had taken a few steps towards them with a view to separate them in case of an altercation, but that before he had time to reach them the shot was fired. Fonvielle knew that Dallas had a pistol, but there was a strike at the time, Dallas was a special policeman and had a right to carry it and not unnaturally did. The only sinister designs of which there is any evidence were of Southwell against Dallas, unless Dallas' remark just before the shooting be taken to fore-shadow the event, which it certainly did not seem to until after the event had happened. It appears to us extravagant to hold the petitoner lable in a case like this. See *St. Louis-San Francisco R. Co. v. Mills*, 271, U. S. 344, 70, L. Ed, 979 46 Sup. Ct. Rep. 520."—*(Italics ours)*.

Inez M. Jamison, et al., etc.,
Petitioner.

vs.

Valentin Encarnacion.

281 U. S., 635; 74 L. Ed., 1082; 50 S. Ct. 440.
Decided May 26, 1930.

As will be seen by the date entries above, the case now being digested was decided eight years later than the case of *Davis v. Green, supra,* and three years after the decision in *Atlantic Coast Line Ry., Co., vs. Southwell, supra.*

The reports of the Encarnacion case will be found in 224 App. Div. (N. Y.), 260; 230 N. Y., Sup. 16; 251 N. Y., 218, and 167 N E 422.

The facts briefly stated are as follows:

The plaintiff was a member of a crew loading a barge at Brooklyn, N. Y. One Curren was the foreman of the crew, While plaintiff was upon the barge engaged in his work, the foreman committed an assault and battery upon him and seriously injured him. The action was brought under the Merchant Marine Act and the Federal Employers' Liability Act. The Merchant Marine Act is now Section 688, Title 46, USCA, which, among other things, provides: *"That in any action by an injured seaman "all statutes of the United States conferring or regulating the right or remedy in case of personal injury to railway employees shall be applicable."—(Italics ours).*

The above quoted language has repeatedly been held to be a direct reference to the Federal Employers' Liability Act.

From all the reports of the case, the following facts were clearly established:

The specific work at hand at the time of plaintiff's injury was the loading of the barge. The foreman cursed the plaintiff for an opprobious name and ordered him to "hurry up." The plaintiff replied that he knew what to do. Whereupon, the foreman knocked him down with his fist. In the fall the plaintiff claimed that he was seriously hurt. The plaintiff was awarded a verdict of $2500.00, for which judgment was entered.

On appeal to the Supreme Court of New York, *this judgment and verdict was reversed, the reversal opinion holding in substance that an employer was not liable for a assualt and battery by one employee upon another, although the offending employee was at the time acting as gang boss.* Among other things, the Court said:

> "There is no analogy between the real case and the invoked rules. The Federal Employers' Liability Act, supra, is explicit in predicating liability upon 'negligence.' No term or phrase other than 'negligence' as a basis of liability is mentioned in the legislation. Certainly 'assault' is nowhere mentioned or referred to. The entire theory of the act is that of negligence, as the term has been understood from time immemorial, emphasized by provisions for a diminution of damages recovered when there is found to be 'negligence attributable to such employee,' or he has 'been guilty of contributory negligence.' It is these provisions only which were extended by the Jones Act, supra, with the result in my opinion, that the case of *Gabrielson v. Waydell, supra,* is still alive in so far as concerns a recovery of full indemnity for injury, as at common law.
>
> "The case involves nothing more than that of an assault by one employee upon another, and for such an act a master is not responsible, even though the assault be committed by one who though a fellow servant, subject to his orders, should have hurried his work a little more or done something in a different way. The master, neither expressly nor impliedly, employed the gang boss to commit an assault upon another employee. In my opinion the action is not maintainable, and I therefore advise that the judgment be reversed upon the law and the facts, with costs, and that the complaint be dismissed, with costs."

The plaintiff carried his case to the Court of Appeals of New York. In an unanimous decision, participated in by the late United States Supreme Court Justice Gardozo, then on

the former court, and six other outstanding Justices, that Court reversed the N. Y. Supreme Court and affirmed the judgment in favor of the plaintiff.

It will be borne in mind that in the trial Court the foreman testified that it was his duty to "boss" the gang and to keep them "busy all the time." The entire opinion of the New York Court of Appeals is of much value in passing upon the important issues in the trial of the case at bar. The opinion in part says:

"The cause of action, having arisen upon the navigable waters of the United States, is to be disposed of under the principles of maritime law. *International Stevedoring Co. vs. Haverty*, 272 U. S., 50, 47, S. Ct. 19, 71 L. Ed. 157; *Northern Coal & Dock Co. v. Strand* 278 U. S. 142, 49, S. Ct. 88, 73 L. Ed:—;*Resigne v. Jarka Co.*, 248 N. Y. 225, 162 N. E., 13. The foreman, in the management of the work intrusted to him by his employer, is a fellow servant of the members of the gang under his direction and control in the performance of the work. *Crispin v. Babbit*, 81 N. Y. 516, 37 Am, Rep. 521. For injuries suffered by the men placed under the authority of such a one as the result of his negligence or misconduct in the furtherance of the employer's business, it has been held that the employer is not liable to indemnify the injured employee. *Gabrielson v. Waydell*, 135 N. Y. 1, 31 N. E. 969, 17 L. R. A. 228, 31 Am. St. Rep. 793. Such was the rule of the common law and of the admiralty law as defined by this court.

"The admiralty and maritime law is subject to change by Congress. Congress has acted, and the Supreme Court of the United States has said broadly *(International Stevedoring Co. v. Haverty, supra)* that 'the statutes do away with the fellow-servant rule' as applied to longshoremen engaged in stowing freight in the hold of a ship within the admiralty and maritime jurisdiction of the United States. We would be content to give this declaration its full face value were it not for the fact that the case was one of the negligence, rather than the misconduct, of a foreman. It thus becomes neces-

sary to examine the course of legislation on the subject to determine its bearing on our decisions.

"The fellow servant rule is generally stated in terms of negligence only, although misconduct of a co-employee is also within its scope. By the Seaman's Act of March 4, 1915 (38 Stat. 1185, c. 153, Section 20), it was provided that 'in any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority.' This language proved to be inadequate to substitute the common-law measure of liability for personal injuries for the maritime rule of limited libiality in the case of seaman (*Chelentis v. Luckenbach, S. S. Co.* 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed 1171) and was probably appropriate only to the relief of seamen in any event (*Yaconi v. Brady & Gioe*, 246 N. Y. 300, 158 N. E. 876). It was, however, a gesture in the direction of wider responsibility on the part of the master for the negligence of his servants. It was succeeded by the Jones Act (Merchant Marine Act of June 5, 1920; 41 Stat. c. 250, Section 33; 3 Mason's U. S. Code, tit. 46. c. 18, Section 688, p. 3273; 46 USCA, Section 688), which extends to seamen who shall suffer personal injury in the course of their employment the rights and remedies given by Congress to railroad employees (*Panama R. Co. v. Johnson*, 264 U. S. 375, 389, 44 S. Ct. 391, 68 L. Ed. 748; *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 324, 47 S. Ct. 600, 71 L. Ed. 1069; *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 49 S. Ct. 75, 73, L. Ed.—) by providing that they may maintain actions against their employers for damages, and that in such actions all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply to them. The reference is to the Federal Employers' Liability Act of April 22, 1908 (35 Stat. c. 149, Section 1; 3 Mason's U. S. Code, tit. 45, c. 2, Section 51, p. 3064; 45 USCA, Section 51) and its amendments which is thus incorporated into the maritime law of the United States. That act, wherever applicable, read literally, imposes liability on

the employer for the acts of a fellow-servant only in cases of personal injury to an employee resulting from negligence. Misconduct is not in terms included. (See, also, N. Y. Employers' Liability Law, L. 1921, c. 121, which applies the vice principal rule only to cases of negligence). Nevertheless, Mr. Justice Holmes, writing for the United States Supreme Court in the Haverty case, supra, reads the act as doing away with the fellow servant rule as freely as he reads the word 'seamen' so as to include 'stevedores.' This, it would seem, is its popular interpretation. *As the word 'seamen' in the act includes 'stevedores,' so the word 'negligence' should, 'in view of the broad field in which Congress has disapproved and changed the (fellow-servant) rule introduced into the common law within less than a 'century,' include 'misconduct.'* Reading *Gabrielson v. Waydell, supra,* in the lift of the Merchant Marine Act, and its history, we do not hesitate to say that the authority of the case as a rule of maritime law has been largely, if not fully, spent; that we should not waste time in pointing out distinctions between negligence and misconduct in this connection in order to defeat plaintiff's recovery, but should hold broadly that Congress, in doing away with the fellow servant rule in cases of negligence coming within the scope of its legislation, has left neither substance nor reason to our earlier decision, and that it is no longer controlling. We cannot, with a fair countenance, say that the master is now liable to his servants for personal injuries due to a careless foreman, but is not liable for personal injuries inflicted on them by a brutal foreman in directing the performance of the work and intended and believed to be for the interest of the master.—*Mott v. Consumers' Ice Co. supra.*

"The case differs materially from Davis v. Green, 260, U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299, *In that case the engineer had received an order from the conductor which it was his duty to obey. Out of personal rancor, he killed the conductor. Neither allegations ner proof present the killing as having been done to further the master's business."—(Italics ours).*

(Encarnacion v. Jamison, et al., 167 N. E., 422.)

The defendant in turn took the case to the United States Supreme Court, which affirmed the Court of Appeals.

Every word of the final decision of the United States Supreme Court is highly important and we quote the entire opinion as follows:

"This is an action brought in the Supreme Court of New York by respondent, a longshoreman, against William A. Jamison, an employing stevedore, to recover damages for personal injuries. Plaintiff was employed by defendant as a member of a crew loading a barge lying at Brooklyn in the navigable waters of the United States. One Curren was the foreman in charge of the crew. While plaintiff was upon the barge engaged with others in loading it, the foreman struck and seriously injured him.

"*The evidence showed that the foreman was authorized by the employer to direct the crew and to keep them at work.* Plaintiff's evidence was sufficient to warrant a finding that the foreman assaulted him without provocation and to hurry him about the work. *The trial judge instructed the jury that the defendant would not be liable if the foreman assaulted plaintiff by reason of a personal difference, but that, if the foreman in the course of his employment committeed an unprovoked assault upon plaintiff in furtherance of defendant's work plaintiff might recover.* The jury returned a verdict for $2,500 in favor of plaintiff and the court gave him judgment for that amount.

"The case was taken to the appellate division, and there plaintiff invoked in support of the judgment Section 33 of the Merchant Marine Act (June 5), 1920, U. S. C. title 46, Section 688, and the Federal Employers' Liability Act of April 22, 1908, U. S. C. title 45, Sections 51-59. The court (224 App. Div. 260, 230 N. Y. Supp. 16) held that plaintiff's injury was not the result of any neg-

ligence within the meaning of the latter act, and reversed the judgment.

"The Court of Appeals (251 N. Y. 218, 167 N. E. 422) held that the Federal Employers' Liability Act applies, and, after quoting the language of this court in *International Stevedoring v. Haverty*, 272 U. S. 50, 52, 71, L. Ed. 157, 159, 47 Sup. Ct. Rep. 19, said (p. 223): 'As the word 'seamen' in the act (Section 33 Merchant Marine Act) included 'stevedores,' so the word 'negligence' Section 1, Federal Employers' Liability Act) should . . . include 'misconduct.' It reversed the judgment of the appellate division and affirmed that of the Supreme Court.

"Section 33 of the Merchant Marine Act provides:

" 'Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . .'

"Section 1 of the Federal Employers' Liability Act provides:

" 'Every common carrier by railroad while engaging in (interstate) commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . .'

"Plaintiff was a seaman within the meaning of Section 33 (International Stevedoring Co. v Haverty, supra), and, as he sustained the injuries complained of while loading a vessel in navigable waters, the case is governed by the maritime law as modified by the acts of Congress above referred to. *Northern Coal & Dock Co. v. Strand*, 278 U. S. 142, 73 L. Ed. 232, 49, Sup. Ct. Rep. 88,

28 N. C. C. A. 18; *Panama R. Co. v. Johnson*, 264 U. S. 375, 68, L. Ed. 748, 44 Sup. Ct. Rep. 391. *He is entitled to recover if within the meaning of Section 1, his injuries resulted from the negligence of the foreman.*

"The question is whether 'negligence,' as there used includes the assault in question. The measure was adopted for the relief of a large class of persons employed in hazardous work in the service described. It abrogates the common law rule that makes every employee bear the risk of injury or death through the fault of negligence of fellow servants and applies the principle of respondent superior (Section 1), eliminates the defense of contributory negligence and substitutes a rule of comparative negligence (Section 3), abolishes the defense of assumption of risk where the violation of a statute enacted for the safety of employees is a contributing cause (Section 4), and denounces all contracts, rules, and regulations calculated to exempt the employer from liability created by the act. (Section 5).

"The reports of the House and Senate committees having the bill in charge condemn the fellow-servant rule as operating unjustly when applied to modern conditions in actions against carriers to recover damages for injury or death of their employees and show that a complete abrogation of that rule was intended. The act, like an earlier similar one that was held invalid because it included subjects beyond the reach of Congress, is intended to stimulate carriers to greater diligence for the safety of their employees and of the persons and property of their patrons. Second Employers' Liability Cases *(Mendou v New York, N. H. & H. R. Co.* 223 U. S. 1, 51, 56 L. Ed. 327, 346, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 375; *Minneapolis, St. P. & S. Ste. M. R, Co, v Rock*, 279 U. S. 410, 413, 73 L. Ed., 769, 49 Sup. Ct. Rep. 363.

"The rule that statutes in derogation of the common law are to be strictly construed does not require such an

adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure, Johnson v. Southern P. Co. 196 U. S. 1, 17, 18, 49 L. Ed. 363, 369, 370, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; *Gooch v. Oregon Short Line R. Co.* 258 U. S. 22, 24, 66 L. Ed. 443, 445, 42 Sup. Ct. Rep. 192; *Barrett v. Van Pelt*, 268 U. S. 85, 90, 69 L. Ed. 851, 860, 45 Sup. Ct. Rep. 437; *Johnson v United States*, 18 L. R. A. (N. S.) 1194, 89 C. C. A. 508, 163 Fed. 30, 32; *Cf. H. Hackfield & Co. v. United States*, 197 U. S., 442, 499, et seq., 49 L. Ed. 826, 829, 25 Sup. Ct. Rep. 456. *The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning.* It is to be construed liberally to fulfill the purpose for which it was enacted and to that end the word may be read to include all the meanings given to it by courts and within the word as ordinarily used. *Miller v. Robertson*, 266 U. S. 243, 248, 250, 69 L. Ed. 265, 271, 272, 45 Sup. Ct. Rep. 73.

"As the Federal Employers' Liability Act does not create liability without fault *(Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 501, 58 L. Ed. 1062, 1068, L. R. A. 1915, C. 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834), it may reasonably be construed in contrast with proposals and enactments to make employers liable, in the absence of any tortious act, for the payment of compensation for personal injuries or death of employees arising in the course of their employment.

"'*Negligence' is a word of broad significance, and may not readily be defined with accuracy. Courts usually refrain from attempts comprehensively to state its meaning. While liability arises when one suffers injury as the result of any breach of duty owed him by another chargeable with knowledge of the probable result of his conduct, actionable negligence is often deemed—and we need not pause to consider whether rightly—to include other elements. Some courts call wilful misconduct evin-*

cing intention or willingness to cause injury to another gross negligence. Bolin v. Chicago, St. P. M. & O. R. Co. 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446, 9 Am. Neg. Rep. 209, and cases cited. And see *Peoria Bridge Asso. v. Loomis*, 20 Ill. 235, 251, 71 Am. Dec. 263; *Chicago, R. I. & P. R. Co. v. Hamler*, 215 Ill. 525, I. L. R, A. (N. S.) 674, 106 Am. St. Rep. 187, 74 N. E. 705, 3 Ann. Cas. 42, and cases cited; *Mercer v. Corbin*, 117 Ind. 450, 3 L. R. A. 21, 10 Am. St. Rep. 76, 20 N. E. 132. *And it has been held that the use of excessive force causing injury to an employee by the superintendent of a factory in order to induce her to remain at work was not a trespass as distinguished from a careless or negligent act. Richard v. Amoskeag Mfg. Co.* 79 N. H. 380, 331, 8 A. L. R. 1426, 109 Atl. 88. *While the assault of which plaintiff complains was in excess of the authority conferred by the employer upon the foreman, it was committed in the course of the discharge of his duties and in furtherance of the work of the employer's business. As unquestionably the employer would be liable if plaintiff's injuries had been caused by mere inadvertence or carelessness on the part of the offending foreman, it would be unreasonable and in conflict with the purpose of Congress to hold that the assault, a much graver breach of duty, was not negligence within the meaning of the act. Johnson v. Southern P. Co., supra; Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 9, 10, 51 L. Ed. 681, 685, 27 Sup. Ct. Rep. 407."—*(Italics ours).*

Alpha Steamship Corporation et al.,
Petitioners.
vs.
Robert Cain
281 U. S., 642; 74 L. Ed. 1086; 50 S. Ct. 443.
Decided May 26, 1930.

The very same day the Encarnacion opinion was filed, the United State Supreme Court filed a similar opinion in the

above entitled case, which was tried below in the United States District Court for the Southern District of New York. The plaintiff was awarded a verdict of $12,000, which was affirmed in the Circuit Court of Appeals for the Second Circuit. (See 35 Fed. Rep. (2nd), 717).

From the two reports in the case, these pertinent facts are clearly established

Plaintiff was a seaman employed as a fireman on the American Steamship Alpha navigating the high seas. The incident which was the basis of this action occurred on shipboard while the vessel lay in a Venezuelan port. One Jackson was employed as the second assistant engineer on the ship. The plaintiff on the day in question showed up on his "watch" some forty minutes late. Going down the stairway to his work he encountered the first assistant engineer and became engaged in an altercation with him concerning his tardiness. Cain said he retreated to the top of the stairs and observed Jackson, the second assistant engineer talking to the first assistant. Jackson was the officer on duty in the engine room. After talking to the first assistant, Jackson followed Cain and, according to the plaintiff, struck him twice about the head with a heavy monkey wrench. The plaintiff, after being knocked down, crawled to the captain of the ship and reported the incident. He testified that Jackson was drunk. Jackson in turned claimed that Cain was drunk and that his injuries were the result of falling on deck. The plaintiff sustained almost fatal head injuries.

Upon the trial of the case, the jury returned a verdict for $12,000 in his favor. The District Judge refused to reduce it on the grounds of excessiveness.

The Circuit Court of Appeals affirmed the holdings of the District Court. The parties, the trial Court and the Circuit Court of Appeals treated the case as being one under the general maritime law of the United States and not under the Merchant Marine Act and the Federal Employers' Liability Act.

The following extracts from the Circuit Court of Appeals opinion are pertinent.

> "*Without* reciting more more of the evidence, it will suffice to say that, assuming the law to be as the court stated it, *the evidence raised issues for the jury.* Jackson's duty was to get Cain to work, if he thought Cain was able to work. The jury were entitled to find that he approached Cain for that purpose. He himself says, 'I hollered to him to come down.' They were also entitled to believe Cain's version of what transpired when the two men met at the top of the stairway. *Hence they might infer that Jackson gave the blows for the purpose of compelling Cain's immediate attendance and in connection with reprimanding him for his tardiness, although excessive violence was used, this is not conclusive that Jackson was not acting in the ship's business. The evidence made it a jury question whether he committed the assault as an officer of the ship, in an effort to maintain discipline and obtain a full engine room crew for the watch of which he was in charge, or struck the blows in a private brawl. In Davis v. Green,* 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299, a very different situation was presented. There the killing of the conductor resulted from the engineer's personal rancor, and was not in furtherance of the employer's business. Here we must accept the jury's verdict as a finding that Jackson's blows were not given in a private brawl, but the exercise of his authority as an officer. Hence we must determine the legal question first mentioned. The rule of the common law, as established by the weight of modern authority, imposes liability upon an employer for an assault committed by one of his employees upon another, when the former is in a position of authority and acts within the general scope and line of his employment. *Encarnacion v. Jamison,* 251 N. Y. 218, 167 N. E. 422. . . . Complaint is made because the court refused to charge that no subordinate officer has authority to administer discipline

without express delegation from the master. As an abstract legal proposition this may be true. *United States v. Taylor*, Fed. Cas. No. 16, 442; *Murray v. White*, 9 F. 562 (D. C. Me.) But, if charged in the form requested, it would have been likely to mislead the jury into the belief that the defendants could not be held responsible for Jackson's assault, if they should find he committed one. Obviously a blow with a monkey wrench was not a proper way to administer discipline, and the jury had in effect been previously so told. Jackson, as Cain's superior officer, had authority to order him on duty, or to reprimand him for being late, and if in connection with such an order or such a reprimand he used physical violence, for the purpose of forwarding the ship's business, the owner may be held liable. We do not regard as error the refusal of the requested charge."—*(Italics ours)*.

The ship owners carried the case on appeal to the United States Supreme Court. In a short opinion the highest Court in the land said:

"Respondent was a seaman employed as a fireman on the American Steamship Alpha navigating the high seas. The corporation petitioner owned and operated the vessel and the other petitioners were in possession of her. Respondent sued petitioners in the federal court for the southern district of New York to recover damages for personal injuries caused by an assault upon him by his superior, one Jackson, an assistant engineer in charge of the engine room. The complaint charged, and the evidence was sufficient to warrant a finding, that Jackson was authorized by defendants to direct plaintiff about his work, and that, for the purpose of reprimanding him for tardiness and compelling him to work, Jackson struck plaintiff with a wrench and seriously injured him. That was the basis of fact upon which the jury under the charge of the court was authorized to find for plaintiff. The jury returned a verdict in favor of plaintif for $12,-

000 and the judgment thereon was affirmed in the circuit court of appeals.

"That court expressed the opinion (35 F. (2nd) 717, 721) that Section 33 of the Merchant Marine Act, U. S. C. title 46, Section 688, and the Federal Employers' Liability Act, U. S. C. title 45, Sections 51-59, did not apply, and held defendants liable under the general maritime law without regard to these acts. But in *Jamison v. Encarnacion* decided this day (281 U. S. 635, ante, 1082, 50 Sup. Ct. Rep. 440) *we hold that such an assault is negligence within the meaning of Section 1 of the Federal Employers' Liability Act*, which is made available to seamen by Section 33 of the Merchant Marine Act. *The ruling in that case controls in this.*

DISTINCTIONS OF CASES

We point out the following distinctions between the cases of *Davis v. Green* and *A. C. L. Ry. vs. Southwell* and the case at bar:

1. The bad feeling of long standing between the deceased and his slayer.

2. Previous difficulties and harsh words between the two men.

3. The conductor was superior officer of the engineer and had given him an order. It was the inferior who killed his superior. Whereas, in this case the superior slew his inferior as the result of words about his work.

4. The desperate actions of the engineer in almost killing the negro switchman just before he shot his superior officer, showed that he was in a wild rage entirely unconnected with the company's business.

5. It was not the engineer's duty to order the conductor about with reference to the throwing of a switch, or any other train operation. Whereas, in this case it was the duty of the

engineer to give instructions to the deceased.

6. The engineer stopped his engine, came down and out of his cab and cursed at his superior officer, whose directions it was his duty to obey.

Similar distinctions appear with reference to the Southwell case, except that there are even stronger grounds to show that the killing was not done in the course of the employment of the special policeman Dallas.

These additional distinctions may be emphasized:

1. Southwell, the deceased, had completed his work and was on his way home at the time.

2. Southwell had a bitter enmity towards Dallas and had been reprimanded for his threats and acts towards him. Their differences seemed to have grown out of a strike which was going on at the time and was purely personal.

3. Dallas had absolutely no authority over Southwell and had no company business with him.

These, and other, reasons we think show that the Davis v. Green and Atlantic Coast Line Ry. Co. v. Southwell, cases are not authority here, but that the Encarnacion and Cain cases, being direct constructions of the Federal Employers' Liability Act in a case where a superior officer brutally assaulted an inferior employee in the course of their respective duties are controlling.

End